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In the Supreme Court of the United States

BEXLEY CITY SCHOOL DISTRICT, et al.,
Petitioners,

v.

JUSTIN KNABLE, a minor by and through his mother and next friend, Marilyn Knable,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether parents who bear some responsibility for procedural errors, such as missed timelines and the incompleteness of an individualized education program (IEP), can still be entitled to tuition reimbursement for their unilateral private placement of their disabled child under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA").

2. Whether parents who unilaterally place their disabled child in a restrictive setting, such as a residential school, when that setting is not necessary for the child's education can still be entitled to tuition reimbursement under the IDEA.

PARTIES TO THE PROCEEDING

Petitioners

Bexley City School District (Franklin County, Ohio), Philip E. Tieman, Superintendent, and Bexley City School District Board of Education.

Respondent

Justin Knable, a minor, by and through his mother and next friend Marilyn Knable.

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I. STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. (App. 1a)[1] Pursuant to Supreme Court Rule 13.01, this petition is being filed within 90 days after entry of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

II. RELEVANT STATUTES AND REGULATIONS

This case is brought under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"). The pertinent provisions of the IDEA are set forth below.

20 U.S.C. § 1415(e)(2):

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at

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[1] All references to the appendix will be designated by App. __.

the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1412(5)(B):

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:
(5) The State has established
(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[2]

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[2] Amendments were made to the IDEA in 1997, and these amendments have prospective application only. See Tucker v. Calloway County Bd. of Educ., 136 F.3d 495, 500-01 (6th Cir. 1998). The amendments to the IDEA do not change the substance of the statutes relevant to this case, although the relevant provisions have been renumbered. Compare 20 U.S.C. § 1415(e)(2) (1994) to 20 U.S.C. § 1415(i)(2) (1997) and 20 U.S.C. § 1412(5)(B)(1991) to 20 U.S.C. §1412(a)(5)(A) (1997).

III. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Court Disposition

This is an action for tuition reimbursement under the Individuals with Disabilities Education Act (IDEA). In August 1994, the Knables unilaterally withdrew their son Justin from the Bexley City School District (Bexley) in Ohio and placed him at the Grove School, a private psychotherapeutic boarding school in Connecticut, at a total cost of $51,300 per year. (Ex. 121; Ex. 122, p. 3; Ex. 139, p. 4)[3] The Knables brought a due process request in January 1995 claiming that they were entitled to tuition reimbursement for Grove School. (Ex. 134) An impartial hearing officer (IHO) held a four-day hearing and rendered a decision that the Knables were not entitled to tuition reimbursement. (JA 550)

The IHO held that the individualized education program (IEP) proposed by Bexley for placement at Harding School Plus, a local day treatment program, was appropriate despite some technical errors. (JA 545-46, 550) The IHO held that Harding School Plus had the necessary programming and support services in place for Justin (JA 545) and that the proposed IEP had specific academic goals for Justin and addressed his behavioral disabilities (JA 546).

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[3] JA __ refers to the Joint Appendix and page number from that appendix filed in the court of appeals; Tr. __ and Ex. __ refer to the transcript and exhibits from the administrative due process hearing; and Chorney __ and Bilker __ refer to trial depositions from the hearing.

With respect to procedural errors, Bexley had missed some timelines and the IEP it proposed was in draft form, but the IHO held that these technical errors were not a *per se* violation of the IDEA. With respect to the issue of timelines, the IHO held:

> [T]here is abundant evidence to support the conclusion that Bexley acted in good faith toward the Knables throughout this period. In addition, Bexley continued to confer with the Knables throughout the remainder of Justin's sixth grade and into that summer, in attempts to involve the Knables directly in the formulation of the proposed IEP for the Harding School Plus Program that was delivered to the Knables on August 31, 1994.
>
> * * *
>
> Bexley offered continuing and abundant opportunities to the Knables to be involved in fashioning an IEP, beginning as early as December 8, 1993.

(JA 543, 546) With respect to the draft nature of the IEP, the IHO held:

> Bexley cannot bear sole responsibility for unanswered questions in the proposed IEP. The Knables contributed to the presence of unanswered questions when they refused to agree upon any placement for Justin that was not a residential placement. Their steadfast insistence upon a residential placement impeded Bexley's ability to reach agreement with the Knables upon an IEP, since Bexley

> believed that an appropriate IEP for Justin did not require a residential placement.

(JA 547) The IHO further held that Grove School was not necessary for Justin. The IHO specifically rejected the testimony of the Knables' expert witness, Dr. Kathleen Quinn, that residential placement was necessary holding that Dr. Quinn's testimony was based on faulty assumptions that were not borne out by the record. (JA 547-48)

A state level review officer (SLRO) dismissed the case in its entirety holding that the Knables had failed to follow the proper procedures in bringing their due process request. (Tr. 559) The Knables appealed to federal district court. (JA 10) Bexley moved to dismiss on the procedural issues identified by the SLRO, and the district court rejected that motion. (JA 562) Given the district court's order overruling the SLRO's decision, the parties stipulated that the court could use the IHO's decision as the basis for its review. (App. 44a)

The district court affirmed the IHO's decision in its entirety. (App. 36a) With respect to Bexley's proposed IEP, the district court held that it was aimed at addressing Justin's disability and that the Harding School Plus program would have been appropriate for him. (App. 56a-57a) The district court held the any procedural errors did not result in a violation of the IDEA. With respect to the timelines, the court held, "After Justin had been identified as [severe behavior handicapped], Bexley afforded the Knables significant opportunities to become and stay involved in the process of formulating an IEP. . . . Moreover, Bexley continued to work with the Knables throughout Justin's sixth grade year to formulate an IEP." (App. 56a) With respect to the draft nature of the IEP, the court held:

> The Knables argue that the proposed IEP was not complete, and that the Court should not review some fictitious IEP that Bexley "could have" provided. The Court notes that it agrees with the IHO that Bexley offered "continuing and abundant opportunities to the Knables to be involved in fashioning an IEP. . . ." (IHO Dec., p. 31) The Knables did contribute to unanswered questions about the IEP because they refused to consider anything but residential placement for Justin.

(App. 59a) The district court also discounted the testimony of the Knables' expert witness, concluding that the record did not support her testimony that Justin needed a residential setting. (App. 60a) As a result, the court concluded that Bexley was not responsible for paying for the costs of placing Justin at Grove School. (App. 63a)

The Sixth Circuit Court of Appeals heard these issues on appeal and reversed the district court's decision. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 772 (6th Cir. 2001) (App. 32a). The court of appeals reviewed the same procedural errors that the IHO and district court did. Despite the specific findings of the IHO and district court otherwise, the court refused to find the Knables even partially culpable for the IEP process and held that they were denied any meaningful opportunity to participate in the IEP process. Knable, 238 F.3d at 766 (App. 18a).

The court also put sole responsibility for the draft nature of the IEP on Bexley, contrary to the findings of the IHO and district court. Knable, 238 F.3d at 768 (App. 23a). Holding that only Bexley was responsible for the contents of the IEP, the court held that it had violated the IDEA. Knable,

238 F.3d at 766 (App. 24a). The court did not even address the specific findings of the IHO and district court that the Knables contributed to the draft nature of the IEP because of their "steadfast insistence upon a residential placement." (JA 547)

With respect to the residential placement, the Sixth Circuit incorrectly held that the district court did not address the propriety of the Knables' placement of Justin at Grove School. Knable, 238 F.3d at 770 (App. 27a). As mentioned above, the district court specifically held that the Knables had not provided any credible testimony that Grove School was a necessary placement for Justin. (App. 60a) The court of appeals ignored that district court conclusion. Instead, it determined that Justin had benefited educationally at Grove School; and therefore, the school district should reimburse the Knables for their reasonable costs, remanding the issue of the reimbursement award to the district court. The court of appeals specifically rejected the argument that the Knables should not be reimbursed for the residential placement because it was too restrictive:

> Bexley contends that the Knables are not entitled to reimbursement because Grove School was not the "least restrictive" placement as required by the IDEA. *See* 20 U.S.C. § 1412(5); 34 C.F.R. § 300.550. We noted in [Cleveland Heights-Univ. Heights City Sc. Dist. v. Boss, 144 F.3d 391 (6th Cir. 1998)], however, that parents who have not been treated properly under the IDEA and who unilaterally withdraw their child from public school will commonly place their child in a private school that specializes in teaching children with disabilities. *See* 144 F.3d at 400

> n. 7. We would vitiate the right of parental placement recognized in [School Comm. of Burlington. v. Dept. of Educ. of Mass., 471 U.S. 359 (1985)] and [Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993)] were we to find that such private school placements automatically violated the IDEA's mainstreaming requirement. *See id.*

Knable, 238 F.3d at 770 (App. 28a).

B. Statement of Facts

1. The development of an IEP for Justin

At the beginning of Justin's sixth grade year, in 1993-94, school officials began the process to have Justin evaluated for special education services. (Ex. 109, pp. 15-16) An evaluation team met on November 22, 1993 and unanimously agreed that Justin was eligible for services for severe behavior handicapped (SBH) students. (Tr. 534; Ex. 16)

Bexley's school psychologist, Nadine Ross, arranged for a December 8, 1993 meeting with the Knables to discuss the evaluation and possible placements for Justin. Bexley did not have an SBH unit within the district in 1993, so Ms. Ross investigated other placements, including Hannah Neil Center for Children (Hannah Neil). (Tr. 1104, 1248) This placement option was shared with the Knables at the December 8 meeting, but the Knables expressed concerns about the "population" at Hannah Neil and they never visited the school, although they were encouraged to do so. (Tr. 911)

On December 13, 1993, the Knables unilaterally placed Justin at the Ohio State University, Upham Hall, for in-patient treatment where he remained until February 1994. (Tr. 32) Bexley worked with the Upham staff regarding educational programming for Justin and prepared a transition plan for Justin's return to the regular education classroom, which was the placement recommended by the Upham staff. (Tr. 105; Ex. 3, p. 4)

The Knables and Bexley had additional meetings in April and June 1994, during which they discussed Justin's identification and placement. (Tr. 1117-18, 1121-22) Ms. Ross contacted additional facilities about possible placement for Justin including Harding School Plus. (Tr. 553)

Even though the Knables met with Bexley, they were pursuing residential placement for Justin on their own. As early as September 1993, before the evaluation was completed, the Knables were exploring the option of a boarding school for Justin. (Tr. 838) Sometime in May or June 1994, Mrs. Knable retained a book listing boarding schools. (Tr. 67-68) Mrs. Knable called Culvert Military School for information on their residential school, and the Knables personally visited both Cardigan Mountain School and Grove School. (Id.) The Knables felt that they needed a rest from Justin. (Tr. 231-32, 1043-44) When Mr. Knable visited Harding School Plus, the program Bexley proposed in the summer of 1994, Mr. Knable told one of the teachers that he was not sure if the Knables wanted to keep Justin at home. (Tr. 1044) Mr. Knable stated that they were independently searching for a boarding school. (Tr. 982)

On August 16 or 17, 1994, Mrs. Knable completed enrollment and student information forms for Grove School. (Tr. 932, 934; Ex. 119, pp. 5-7) On August 18, Grove

officially accepted Justin. (Tr. 934; Ex. 121) On August 23, Mrs. Knable sent completed forms to Grove. (Tr. 934; Ex. 119, p. 9) On August 24, Mr. Knable sent a fax to his attorney asking, "How should I proceed with Bexley as far as informing them of our decision" and informing his counsel, "I am also pursuing experts who would testify." (Ex. 122, p. 3)

On August 18, the same day Justin was accepted to Grove School, Mr. Knable faxed a letter to Dr. Anne Hyland, Bexley's director of curriculum and instruction, requesting an IEP. (Ex. 122, p. 2) Dr. Hyland arranged for Mr. Knable to visit Harding School Plus, and on August 30, she faxed a proposed IEP to the Knables with Harding School Plus as the placement. (Ex. 6) The Knables never responded to the draft IEP and did not inform school officials of their decision to send Justin to Grove School. On September 15, Dr. Hyland wrote a follow-up letter to the Knables asking about their intentions for Justin's education. (Tr. 123-24; Ex. 129) The Knables did not respond. Four months later, on January 31, 1995, the Knables filed a request for due process hearing. (Ex. 134)

2. Grove School and Harding School Plus

Mr. and Mrs. Knable unilaterally enrolled Justin at Grove School without consulting any Bexley school official and without receiving any professional advice. (Tr. 934, 974; Ex. 119, p. 9) They did not contact Dr. Quinn, who served as their expert witness, until late 1994 after Justin had already been at Grove for several months. (Tr. 103-04, 372; Ex. 122, p. 3)

Justin did not need a residential setting for his education. While he may have been explosive and

behaviorally out of control at home, there was no evidence of this kind of behavior in a school setting. Justin's behavior problems at school were limited to being disrespectful to teachers and fellow students, swearing, having poor organizational skills and disrupting class by talking to other students. (Tr. 255-65, 270-279)

The Knables' expert witness testified that Justin needed consistency (Tr. 403), yet the Executive Director of Grove School testified, "[T]he rules are not cut in stone like they are in lots of other programs. We're not a behaviorally oriented program." (Chorney 16-17) (emphasis added) On the other hand, Harding School Plus, a local day treatment program, only had 24 students in the 1994-95 school year and 18 were identified SBH, just like Justin. (Tr. 1009) The teaching staff was certified to teach students with learning disabilities and behavior disorders. (Tr. 1010) There were also three full-time milieu therapists, a nurse, a site technician, one and a half full-time social workers and a psychiatrist and psychologist who consulted with the program. (Tr. 1012-13)

Although Grove School had no individualized program in place for Justin for his first eleven months there (Bilker 48-50), Harding School Plus would have. Harding had a standard point system in place as its behavior system, and the staff modified the standard plan until it found something that would work for a particular student. (Tr. 1023-25) The Harding staff also worked with parents to set up consistent behavior plans at home. (Tr. 1027-28) The social workers met with families on a weekly basis and were always available for crisis situations. (Tr. 1028) They also ran parent support groups once per month. (Id.)

The school district's expert witness, Dr. Christopher, testified that Justin could have made educational progress in the Harding program, because of the support services at Harding and because of Dr. Christopher's own experience with Harding School Plus program students. (Tr. 688-89) Similarly, the Knables' expert, Dr. Quinn, concluded that Justin would have been able to make some educational benefit at the Harding program. (Tr. 411-413)

IV. ARGUMENT

A. The Decision Below Regarding The Obligations of Public Schools In Tuition Reimbursement Cases Warrants Further Review.

1. Framework for tuition reimbursement cases set forth by the Act and this Court.

The IDEA at 20 U.S.C. § 1415(a) requires state and local educational agencies "to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." These procedures include the rights of parents to participate in the development of an IEP and to challenge a proposed IEP in administrative and court proceedings. 20 U.S.C. §§ 1401(a)(19), 1415(b), (d), (e).

During the pendency of any challenge, a child is to "remain in the then current educational placement." 20 U.S.C. § 1415(e)(3). In School Comm. of Burlington v. Department of Educ. of Mass., 471 U.S. 359 (1985), the parents brought a due process request challenging a school district's proposed IEP for their child but then unilaterally

placed their child in a private school. The parents sought reimbursement for the private school tuition costs. This Court held that although the parents had violated § 1415(e)(3) by unilaterally changing their child's current educational placement, they had not waived their rights to reimbursement. Id. at 372. The Court held that the equitable relief available under the IDEA allows a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Id. at 369.

In Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993), the parents also placed their child in a private school after they initiated a due process proceeding. This Court held that the parents could be reimbursed for their private school tuition costs even when that private school did not meet all the technical requirements of the IDEA to provide a free appropriate public education. Id. at 13-15. The Court held that parents are entitled to tuition reimbursement if a court finds (1) the school district failed to provide a free appropriate public education (FAPE) and (2) the parents' private placement is appropriate under the Act. Id. at 15.

2. This Court's review is necessary because the decision below conflicts with decisions of other courts of appeals.

The courts of appeals are split on whether parents' actions or motivations may be considered in determining whether a school district provided FAPE under the first prong of the Carter analysis identified above. Some circuits have held that parents who bear some responsibility for procedural

errors will not be entitled to tuition reimbursement for a unilateral private placement. See, e.g., Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990) cert. denied, 499 U.S. 912 (1991); Patricia P. v. Bd. of Educ. of Oak Park, 203 F.3d 462 (7th Cir. 2000); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998); Ash v. Lake Oswego Sch. Dist. No. 7J, 980 F.2d 585 (9th Cir. 1992); Cain v. Yukon Pub. Sch. Dist. I-27, 775 F.2d 15 (10th Cir. 1985). The Sixth Circuit's decision in Knable, which completely discounted the parents' actions that resulted in missed timelines and entirely ignored their actions that resulted in an incomplete IEP, is in conflict with these decisions.[4]

In Roland M., the First Circuit held that the school district did not deny FAPE and parents were not entitled to reimbursement due to the parents' obstructionist tactics. The court noted that "while all contributors to the IEP's formation were not at the meeting or identified at that time, the shortfall in attendance seems to be more attributable to parental reticence than to defendant's errors." Roland M., 910 F.2d at 995. The court concluded that "[t]he law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism." Id.

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[4] This is not the first time the Sixth Circuit has found itself at odds with other federal courts in tuition reimbursement cases. The Sixth Circuit departed from the other federal courts of appeals in James v. Upper Arlington City Sch. Dist., 228 F.3d 764 (6th Cir. 2000), cert. denied, __ S. Ct. __, 2001 WL 185073, 69 USLW 3593 (U.S. Apr. 23, 2001) (No. 00-1337).

Had the Sixth Circuit applied this standard, the Knables would not have been entitled to reimbursement. While Bexley was investigating possible placements for Justin, the Knables were independently searching for a private boarding school. (Tr. 982) The Knables never responded to the draft IEP sent to them in August 1994. (Tr. 974) Instead, Mr. Knable consulted with his lawyer. (Ex. 122, p. 3) The Knables had already decided on Grove School at the time they received the draft IEP. Any deficiencies in the draft IEP were a result of the Knables' actions, not Bexley's. The Sixth Circuit completely ignored these facts in its decision. Although the court cited to some portion of the district court decision, it failed to address the district court's finding, "The Knables did contribute to unanswered questions about the IEP because they refused to consider anything but residential placement for Justin." (App. 59a) Had the Sixth Circuit considered these findings under the First Circuit's standard articulated in Roland M., the court would have found Bexley's IEP and proposed placement of Harding School Plus appropriate.

When the Sixth Circuit did address findings of the district court or IHO, it overruled those findings in its apparent zeal to rule in favor of the parents. When overruling the IHO, the Sixth Circuit erred by not giving appropriate deference to the IHO's educational expertise as is required by Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The IHO found that Justin had made educational progress in sixth grade, but the Sixth Circuit easily dismissed that finding. Knable, 238 F.3d at 767, n. 4 (App. 19a). The Sixth Circuit also erred in overruling the district court's finding that the parents had a meaningful role in formulating the IEP since that finding was not clearly erroneous. Knable, 238 F.3d at 766 (App. 18a). See, e.g., Tucker, 136 F.3d at 503 (court of appeals applies a clearly erroneous standard of review to the

district court's findings of fact, and a *de novo* standard of review to its conclusion of law).

The Seventh Circuit has also applied a standard similar to the First Circuit's in Patricia P., holding that parents who do not cooperate forfeit their claim to reimbursement for a unilateral private placement. The court noted that "reimbursement under the act is subject to the parties cooperating in the placement process." Patricia P., 203 F.3d at 468. In that case, the court relied upon the state review officer's finding that the school district's failure to properly evaluate the student was due to the parent's failure to cooperate. Id. at 469. Accordingly, the court held that due to her lack of cooperation, the parent could not seek tuition reimbursement for the private placement. Id. The court recognized that a school district cannot be found to have denied FAPE if that circumstance is caused by the actions of the parent.

In so holding, the Seventh Circuit relied upon the decision of the Eighth Circuit in Schoenfeld, which held that reimbursement was precluded because the parents did not give the district the opportunity to formulate an IEP. See id., citing Schoenfeld, 138 F.3d at 382. In Schoenfeld, the court noted that reimbursement for a private placement is only appropriate when the public school placement under an IEP violates the IDEA because the child's needs are not met. Schoenfeld, 138 F.3d at 382. The court held that since the parents' actions in unilaterally withdrawing their child denied the school district the opportunity to formulate a plan to meet the student's needs, it could not be shown that the district had an inadequate plan under the IDEA. Id. Thus, the school district could not be held to have denied FAPE and the parents were not entitled to reimbursement. Under the standard applied by both the Seventh and Eighth Circuits in

Patricia P and Schoenfeld, the Knables' actions in insisting on a residential placement, failing to respond to Bexley's draft IEP and unilaterally enrolling Justin in Grove School effectively denied Bexley the opportunity to develop fully an IEP for Justin in a timely way. Accordingly, under this standard, the Knables would not have been entitled to reimbursement based upon their actions.

Similarly, the Ninth Circuit has recognized that parental actions and motivations are relevant in determining whether a school district has provided FAPE. See Ash, 980 F.2d at 589. In Ash, the court recognized that parents have a "significant burden" to bring their disabled children to the school district's attention before they can resort to self-help with the hope of reimbursement. Id. In so holding, the court specifically "reject[ed] the [parents'] argument that causation is irrelevant in determining whether a school district's procedural failings will permit reimbursement." Id.

The Tenth Circuit has also held that a school district cannot be held to have failed to provide FAPE when the parents' actions have contributed to a "breakdown" in providing an appropriate education to the student. See Cain, 775 F.2d at 19. In that case, after the student was repeatedly suspended from school and his classroom behavior became increasingly disruptive, the school district proposed a homebound program that the parents rejected. Id. School personnel testified that they were left with the impression that the parents were considering a residential placement, and the court concluded that "[a]t that time, there was no reason for the school to develop a new IEP for the student." Id. at 20. The parents claimed that no program was actually offered because the district had not proposed a written IEP; however, the court noted that "[t]his objection overlooks both the school's good faith attempt to incorporate the request of the

parents and the school's legitimate dilemma of producing a written, detailed IEP without a teacher or parental cooperation." Id. Accordingly, the court held that the school district did not deny FAPE and the parents were not entitled to reimbursement for the private school placement. Id. at 21.

The facts are similar in this case. The Knables argued in the administrative and court proceedings below that the proposed IEP was untimely and not complete. However, as the district court held, citing the IHO's decision, "Bexley offered 'continuing and abundant opportunities to the Knables to be involved in fashioning an IEP...'" and the Knables were partly responsible for the incompleteness of the IEP because they refused to consider anything but residential placement. (App. 59a). With these specific findings of the IHO and the district court, the Knables would be held partially culpable for the IEP deficiencies and denied reimbursement under the Tenth Circuit standard.

The Sixth Circuit's refusal to consider the parents' actions in determining whether the School District provided FAPE under the first prong of the Carter test for tuition reimbursement is in conflict with the decisions cited above. Specifically, as the First Circuit has recognized, the law ought not to abet parties who do not cooperate in the IEP process and then attempt to jettison it because of problems created by their own obstructionism. See Roland M., 910 F.2d at 995. Under the precedent of the First, Seventh, Eighth, Ninth and Tenth Circuits as discussed above, a school district will not be held to have denied FAPE when the procedural violations in the IEP process are due, at least in part, to actions by the parents. However, the Sixth Circuit's decision places all of the responsibility on the school district to ensure that the "cooperative" IEP process is followed, regardless of – and, in fact, in spite of – the actions or attitudes of the parents.

Review by this Court is needed to provide guidance to the lower courts on whether parents' actions are relevant in determining whether a school district has provided FAPE under the first prong of the two-prong Carter test and to resolve the split among the circuits on this important, recurring issue.

3. This Court's review is necessary to give lower courts guidance on the necessity for parental cooperation in the IEP process.

This Court needs to provide the lower courts with a coherent framework for analyzing tuition reimbursement cases with respect to the obligations of parents to cooperate with their public school systems. The federal courts have not developed a consistent standard to determine how parents' actions or motivations may affect whether a school district has provided FAPE, and the Sixth Circuit is now seriously out of step with the other courts of appeals on this issue crucial to reimbursement cases.

This Court has granted certiorari due to the importance of an issue to a particular industry. See, e.g., C.I.R. v. Lincoln Savings & Loan Assn., 430 U.S. 345, 346-347 (1971) (granting certiorari to decide question of importance to savings and loan industry). Tuition reimbursement cases are of critical importance to public school systems across the country. Tuition reimbursement cases are high-stakes litigation for school districts. In 1997, Forbes magazine published anecdotal evidence of the high financial costs of tuition reimbursement requests and litigation. Gubernick and Conlin, *The Special Education Scandal*, Forbes, p. 66 (Feb. 10, 1997). The Green Brook School District in New Jersey was reportedly ordered to pay

an annual tuition bill of $193,000 for a student's private residential school outside Boston, Massachusetts. Id. The Capistrano Unified School District in California was reported as having to pay $500,000 for three years of private school tuition and legal fees for both sides. Id. In Washington, D.C., more than a third of the district's entire special education budget is spent on private school placements, even though fewer than one-sixth of the district's special education students attend private schools. Worth, *The Scandal of Special Education*, Washington Monthly, Vol. 31 Iss. 6 (June 1, 1999). The special education budget itself comprises a third of the district's entire budget even though one-tenth of the district's students are in special education. Id.

Money spent on tuition reimbursement litigation is money not being spent on educating other students. Peter Hartman, superintendent of Saddleback Unified School District in California, has stated, "This is what gets stamped as justice, but it's robbing money from regular students." Forbes at p. 69. Other educators have opined that reimbursing parents for private school tuition is not a cost effective way of educating students. Many of the private school students could be adequately taught in public schools, and as a result, "public dollars are sometimes wasted, since it is more expensive to provide most specialized education services privately." Skaruppa, Boyer and Edwards, *Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Ed. Law Rep. 353 (1997).

The costs associated with tuition reimbursement cases emphasize the importance of this area of law to public schools across the country. Parents should have some obligation to work with their public school districts in order to develop educational programming for their children. If they fail to

cooperate – if their motivation or actions affect the school district's ability to develop an IEP or educational program properly – then the school district should not be found to have denied FAPE and the parents should not be entitled to reimbursement.

The Sixth Circuit has taken an all-or-nothing approach that places all of the responsibility on the school district to develop and implement "appropriate" programming, regardless of the parents' responsibility for some of the alleged procedural errors. The Sixth Circuit's decision raises the bar significantly for public schools in its jurisdiction to meet the first prong of the Carter analysis. This Court needs to review this case to provide guidance to the lower courts on where that bar should be set for determining when a public school has offered FAPE and how the nature and timing of parental actions should affect the setting of that bar.

B. The Decision Below Regarding The Appropriateness Of Parental Placements In Tuition Reimbursement Cases Also Merits Review.

1. This Court's review is necessary because the courts of appeal are in conflict over whether a least restrictive environment requirement applies to parental placements.

The IHO and district court denied the Knables' claims for tuition reimbursement in part based on the second-prong of Carter; that is, the Knables had failed to prove that Grove School was a necessary placement for Justin. (App. 62a; JA 547-48) The Sixth Circuit Court of Appeals rejected that legal conclusion outright. It held that the parents were

entitled to reimbursement since Justin's grades and behavior improved at Grove School. Knable, 238 F.3d at 770 (App. 27a-28a). The court never considered the IHO's and district court's findings that Justin could have made educational progress at Harding School Plus, Bexley's proposed placement. Specifically, the Sixth Circuit rejected the legal argument that parents must meet any mainstreaming or least restrictive environment requirement under the IDEA when unilaterally placing their child in a private school. Id.

The Sixth Circuit claimed it was relying on this Court's decisions in Burlington and Carter in rejecting Bexley's least restrictive environment argument; however, this Court did not address that specific issue in Burlington or Carter. See Knable, 238 F.3d at 770 (App. 28a). In Burlington, this Court confirmed that tuition reimbursement was an equitable relief available to parents if the parents' placement, rather than the proposed IEP, is proper under the IDEA. In Carter, the Court examined more closely what burden is on parents to prove that their unilateral placement is proper under the IDEA. Specifically, the Court rejected the public school's argument that the parents' placement was improper because it was not under public supervision and direction and because it did not meet state education standards. Carter, 510 U.S. at 13-14. The Court reasoned, "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. Burlington, 471 U.S. at 373. To read the provisions of [the IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." Carter, 510 U.S. at 13-14 (emphasis added). This Court did not address the specific issue in Knable regarding whether parents are required to meet a mainstreaming or least restrictive environment requirement in their private placement.

Several federal courts have addressed the specific issue presented in Knable and have reached different legal conclusions. The Third Circuit Court of Appeals agrees with the Sixth Circuit that the parents' private placement should not be bound by the same mainstreaming requirements that bind a public school's placement: "An appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement." Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3rd Cir. 1999); cf T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572 (3rd Cir. 2000) (declined to extend Warren G. where both school district and parental placement provided an appropriate education).

The Second Circuit Court of Appeals reached an opposite legal conclusion in M.S. v. Board of Educ. of City of Yonkers, 231 F.3d 96 (2nd Cir. 2000), cert. denied __ U.S. __, 121 S.Ct. 1403 (March 26, 2001). The Second Circuit held that because the parent chose a private school for his child that educated only learning disabled students, the parent bears the burden of proving that such a restrictive, non-mainstream environment was needed to provide the child with an appropriate education. Id. at 104. The Second Circuit specifically tried to reconcile how it reached a different result than the Third and Sixth Circuits:

> As to the restrictive nature of the Stephen Gaynor School, we recognize that parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board. See Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) ("[T]he test for the parents' private placement is that it is appropriate, and not that it is perfect.");

> Cleveland Heights-University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir. 1998) (holding private placement's failure to meet IDEA's mainstreaming requirement does not bar parental reimbursement). Nonetheless, IDEA's requirement that an appropriate education be in the mainstream to the extent possible, see 20 U.S.C. § 1412(5)(B) (1994), remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate, as it was here.
>
> Given the deference we owe to the SRO's [state review officer's] conclusions regarding the formulation of educational programs, and our review of the record, we defer to and accept the SRO's supportable finding that the Stephen Gaynor School was an inappropriate placement for [the child].

Id. at 105.

If the Sixth Circuit applied the legal standard articulated by the Second Circuit to Knable, it would have denied the Knables tuition reimbursement. The IHO and the district court had both found that Grove School was not a necessary placement for Justin. (App. 62a; JA 547-48) Had the Sixth Circuit, like the Second Circuit, concluded that mainstreaming was to be considered and given any deference to the IHO, it would have denied tuition reimbursement.

The Seventh Circuit seems to fall somewhere in between the Second and Sixth Circuits in its review of parental placements and the least restrictive environment

requirements. In Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994), the school district had proposed a program that included interaction with non-disabled peers. The court held the program was not appropriate, not because of technical deficiencies in an IEP, but because it did not provide the minimum educational opportunities required by the IDEA. Id. at 1168. The parents had unilaterally placed the child in a residential setting. In reviewing the least restrictive environment requirement, the Seventh Circuit held that because the school district had not presented any alternative placements, the residential school was the only option available for the child and therefore was the least restrictive alternative requirement. Id. It affirmed an award of tuition reimbursement. Id. at 1169.

Had the Sixth Circuit addressed Knable under the Seventh Circuit standard, it would have denied tuition reimbursement. In Knable, there was another alternative available, Harding School Plus. Although the court had held that the school district's IEP for Harding School Plus did not meet all the technical requirements of the IDEA, the court nevertheless had evidence before it that Harding was an appropriate placement for Justin. Both Bexley's and the Knables' expert witnesses testified that Justin would have made some educational progress at Harding School Plus.

Harding School Plus was an alternative that the Knables could have considered when choosing a placement for their son and was certainly a placement the Sixth Circuit should have considered when it was reviewing the question of least restrictive environment. Harding School Plus as a local day treatment program would have been a less restrictive environment for Justin than Grove School, a residential

setting that was 500 miles from his home. See Evans v. District No. 17 of Douglas County, Neb., 841 F.2d 824, 832 (8th Cir. 1988) ("[C]hildren should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable.") (emphasis added). Under the Seventh Circuit legal framework, the Knables would not have been awarded tuition reimbursement because a less restrictive alternative was available and indeed had been offered.

2. This Court's review is necessary to give direction to lower courts about what legal standard should be applied to determine when a parental placement is appropriate under the Act.

This Court has granted certiorari when a court of appeals' interpretation of a federal act raised issues of importance in administering that act. See, e.g., United States v. Article of Drug, Bacto-Unidisk, 394 U.S. 784, 791 (1979) (granting certiorari to reverse court of appeals' interpretation of definition of "drug" under federal Food, Drug & Cosmetic Act). Tuition reimbursement cases are crucial to the implementation of the IDEA as this Court has already recognized by deciding two tuition reimbursement cases already, Burlington in 1985 and Carter in 1993.

The Court addressed the appropriateness of parental placements in 1993 in Carter but only with respect to the limited facts before it: whether parents were bound by the requirements of the placement being under public supervision and direction and meeting state education standards. In that case, the Second and Fourth Circuits had a conflict. Now, the Second, Third, Sixth and Seventh Circuits are in conflict

about the least restrictive environment requirement. This issue is of fundamental importance to the application of the IDEA. Federal courts need a clear legal framework to determine whether a parents' unilateral placement is appropriate and when tuition reimbursement is an appropriate equitable remedy for parents.

The Court also needs to provide a framework such that the equitable relief of tuition reimbursement remains fair and just to parents and public schools. Currently, in the Sixth Circuit, parents have only the lowest of thresholds to cross regarding their unilateral placement in order to maintain a claim for tuition reimbursement. The Sixth Circuit judges the appropriateness of the placement by whether the child made progress there. A public school will never have the same opportunity to present such evidence since it no longer has control of the child's educational programming when the child is unilaterally withdrawn. In this case, that is particularly troubling as a matter of equity since both expert witnesses testified that Justin could have made some educational progress had he attended Harding School Plus, Bexley's proposed placement. Having evidence of some tangible progress at Harding School Plus could have helped Bexley overcome any technical deficiencies. It never had the chance because the parents took matters in their own hands.

By lowering the threshold for judging the appropriateness of parental placements, the Sixth Circuit has told parents and their attorneys that just about anything goes. They can pick a private placement without regard to its cost, its location, its level or kind of services, or its isolation from home or regular education peers. They also can pick a school not only for educational reasons but also for personal

circumstance without repercussions.[5] If parents are confident that the public school has failed them, they have every motivation to pick the Cadillac program for their child because the Sixth Circuit will make the school district pay for it – even if the Chevrolet is sitting right there.[6]

Tuition reimbursement is an equitable relief that needs to be made available to parents of disabled children; however, there needs to be a balance to the legal framework used in determining when that relief is appropriate. This Court needs to review this case to address that needed balance.

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[5] Mr. and Mrs. Knable candidly testified that they considered a residential setting for Justin because they needed a break from him in their home. (Tr. 231, 1044)

[6] The Sixth Circuit has developed a useful analogy in describing an appropriate education under the IDEA:

> The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.

Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d 455, 459-460 (6th Cir. 1993), cert. denied, 511 U.S. 110 (1994).

V. CONCLUSION

Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari to reconcile the conflicting decisions of the United States courts of appeals. Moreover, the petition should be granted so the Court can provide direction about how to analyze tuition reimbursement cases specifically with respect to the responsibility parents have for the educational programming developed for their child through the public school and for the program they unilaterally pick for their child. Such direction will benefit the lower courts, schools and parents as they all continue to grapple with costly tuition reimbursement litigation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Decided and Filed January 24, 2001]

No. 99-4326/4394

JUSTIN KNABLE, a minor by and through his mother and next friend Marilyn Knable,
Plaintiff-Appellant/Cross-Appellee,

v.

BEXLEY CITY SCHOOL DISTRICT; and PHILLIP E. TIEMAN, Superintendent, Bexley Board of Education,
Defendants-Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 96-01159--Edmund A. Sargus, Jr., District Judge.

Argued: November 2, 2000

Before: KEITH, BOGGS, and COLE, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Parents of a behaviorally disabled boy brought this action under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. §1400 *et seq.*, against the Bexley, Ohio, school district ("Bexley"). The parents sought reimbursement for the costs of placing their child in private school after they withdrew him from Bexley public schools. The district court affirmed the findings of the state Impartial Hearing Officer and denied the parents' request for reimbursement. The parents appeal, arguing that the school district committed both procedural and substantive violations of the IDEA, and consequently denied their son the "free appropriate public education" to which he was entitled under the Act. For the reasons that follow, we **REVERSE** the decision of the district court and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

The facts of this case are largely undisputed. Justin Knable was born on February 3, 1982, and was adopted by Marylin and Robert Knable a few days after birth. When Justin reached school age, his parents enrolled him in a private school, the Columbus Torah Academy. Justin began exhibiting behavioral problems in the first grade, and thereafter began receiving therapy from a private doctor and a child psychologist associated with his school. In early 1992, Justin was diagnosed with Attention Deficit Hyperactivity Disorder, oppositional defiant disorder, and dysthymia, and

was prescribed medication for his conditions. In June of 1992, Justin was admitted to Upham Hall, an inpatient facility at The Ohio State University, due to his aggressive behavior at home.

Justin began attending Bexley public schools in the fifth grade (the 1992-93 school year) after Justin's doctor recommended placement in a more disciplined and structured school environment. Justin continued to demonstrate disruptive behavior while enrolled in Bexley schools.

At the beginning of Justin's sixth-grade year (1993-94), Bexley began the process of having Justin evaluated according to special education law. As early as August 31, 1993, a Teacher Conference Summary stated, "call Knables for permission to evaluate." Bexley officials signed a referral request on September 14, 1993, and mailed a parent-permission form on September 24, 1993. On September 30, 1993, the Knables consented to a multi-factored evaluation of Justin. On November 22, 1993, an evaluation team met and unanimously agreed that Justin was eligible for services for a Severe Behavior Handicap ("SBH"). Nadine Ross, the school psychologist, sent the results of the multi-factored evaluation to Justin's parents on November 23, 1993, and arranged to meet with them to discuss the evaluation and possible placements for Justin.

Because Bexley did not have an SBH unit within the school district at that time, Ms. Ross began investigating the availability of SBH placement settings for Justin outside the school district. Ms. Ross reviewed the SBH program at the Hannah Neil Center for Children ("Hannah Neil") and learned that the program had a space for an additional SBH student.

The Knables and Bexley officials met on December 8, 1993, to discuss the results of Justin's multi-factored evaluation as well as possible placement options. Dr. Hilliard, the principal of Maryland Elementary, recommended placing Justin in the SBH program at Hannah Neil. The Knables expressed doubts about the Hannah Neil program and asked about the possibility of a residential placement for Justin. Although the Knables agreed to visit the Hannah Neil facility and signed a release form so that Bexley might send Hannah Neil information about Justin, they never actually visited or spoke with the staff at Hannah Neil. At the conclusion of the December 8, 1993, meeting, Mr. Knable stated that he "would like to see an IEP" for Justin.[1]

Five days after this meeting, on December 13, 1993, the Knables admitted Justin to Upham Hall because of aggressive behavior at home. That same day, the Knables informed Bexley that Justin had been hospitalized and requested another meeting. The next day, December 14, 1993, the Knables met with Dr. Hilliard; Dr. Anne Hyland, a psychologist in the Bexley school district; and Bill Bowman, Justin's teacher. The Knables stated that Hannah Neil was not an acceptable placement for Justin. Mr. Knable and Bexley officials agreed, however, that Bexley would work with officials at Upham Hall on Justin's educational program while he was hospitalized. During this meeting, Mr. Knable again noted that Justin had not received an IEP. Dr. Hilliard

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[1]An "IEP" is an "individualized education program," which schools must provide to disabled children under the IDEA. *See* 20 U.S.C. §1414(a)(5) (1994).

agreed that Bexley did not have an IEP for Justin, but stated that Bexley did have plans for working with Justin.

Justin remained at Upham Hall from December 13, 1993, to December 22, 1993, and continued day treatment there from January 3, 1994, to February 23, 1994. After ending his treatment at Upham Hall, Justin returned to regular educational placement at Bexley, albeit with a plan intended to deal with his bad behavior. The plan was modified after Justin threatened to run away, and after he stated that he almost slit his wrists because of embarrassment. Justin did almost no work at school, spent a great deal of time in the principal's office, and failed three of his seven subjects. He was often disrespectful to teachers and students, swore regularly, and disrupted classes by talking. Although Justin was not behaviorally out of control at school, the Knables viewed Justin's behavior at home to be explosive and uncontrollable at times.

The Knables and Bexley officials met again on April 6, 1994, and June 8, 1994, to discuss Justin's behavior and possible SBH placement. At the April 6 meeting, Mr. Knable again raised the issue of an IEP for Justin, and stated that he desired more information about an SBH placement for Justin before he would be willing to sign an IEP. At the June 8, 1994, meeting, Mr. Knable again asked when Justin's IEP would be forthcoming. Dr. Hilliard responded that Bexley would work on an IEP and get it to the Knables over the summer.

On July 6, 1994, Bexley officials met with a representative of Upham Hall, Mary Sidman, to discuss possible placements for Justin. Ms. Sidman suggested several

characteristics and goals for a seventh-grade program for Justin. Dr. Hyland concluded from this meeting that the Harding School Plus program in nearby Worthington, Ohio, would satisfy the criteria recommended by Ms. Sidman. The Knables were not present at this meeting.

Throughout Justin's sixth-grade year and the following summer, the Knables had been exploring, on their own, possible residential placements for Justin. On August 16 or 17, 1994, Mrs. Knable completed enrollment and student information forms for Grove School, a psychiatrically-oriented residential program in Connecticut. Grove School officially accepted Justin into its program on August 18, 1994, at a total cost of $51,300 per year.

Also on August 18, 1994, Mr. Knable faxed a letter to Bexley again requesting a written IEP. Dr. Hyland indicated that Bexley was considering the Harding School Plus program as a possible placement for Justin and suggested that Mr. Knable visit Harding to review the program. Mr. Knable visited Harding on August 22, 1994. At a follow-up meeting with Dr. Hyland to discuss the proposed placement at Harding, the Knables raised concerns about the short length of the school day in the program, and the requirement that they pay $80 per day in therapy costs. Mr. Knable also asked whether Bexley would pay for private residential placement in the event the Knables did not agree to Harding School Plus. According to Mr. Knable, Dr. Hyland responded negatively to this inquiry by stating, "you really don't expect that I would write a check to a private school, do you?" At the conclusion of this meeting, Mr. Knable reiterated his demand for an IEP for Justin.

Dr. Hyland faxed Mr. Knable a "draft" IEP for Justin on August 30, 1994. The draft IEP proposed services at Harding School Plus and noted that "Bexley Schools will assume costs beyond what parent insurance will cover associated with the Harding School Plus program."

On September 12, 1994, the Knables accepted Grove School's offer of admission to Justin by sending a check to guarantee Justin's place in the seventh-grade class. The Knables did not respond to Bexley's "draft" IEP, nor did they inform Bexley of their decision to enroll Justin in Grove School. On September 15, 1994, Dr. Hyland wrote a follow-up letter to the Knables regarding the proposed IEP. The Knables' attorney responded by letter on September 20, 1994, and requested an IEP conference. Bexley officials did not ignore that request for an IEP conference; however, Bexley and the Knables agreed that they would not disclose the content of any subsequent meeting or meetings for purposes of this litigation.

Justin attended Grove School for two years. By the fourth marking period of the seventh grade at Grove School, he received all As and Bs on his report card.

B. Procedural Background

On January 31, 1995, the Knables formally requested a due process hearing seeking reimbursement for the costs of placing Justin at Grove School. An Impartial Hearing Officer ("IHO") conducted a four-day hearing in September of 1995 and made the following findings in a decision rendered in June of 1996:

1. The Knables have prevailed in establishing that Bexley did not convene an IEP conference.

2. Bexley has prevailed in establishing that it can provide a free appropriate public education to meet Justin's specific needs. Bexley is not responsible to pay the costs of placing Justin at Grove School or at any other residential facility.

3. The Knables have prevailed in establishing that any charges for services provided to Justin under the proposed IEP that would reduce the family's lifetime coverage limits under their family medical insurance would deprive Justin of a free education and are therefore impermissible. Neither the Knables nor their family medical insurer are responsible to pay such charges.

4. Bexley has prevailed in establishing that a residential placement is not required to provide a [free appropriate public education] to Justin.

Both parties requested a state level administrative review of the IHO's decision. On October 11, 1996, a State Level Review Officer ("SLRO") reversed the decision of the IHO due to its purported conflict with *Wise v. Ohio Department of Educaction,* 80 F.3d 177 (6th Cir. 1996), and dismissed the case. The Knables appealed the SLRO's ruling to the United States District Court for the Southern District of Ohio. Bexley then moved to dismiss the action under Fed. R. Civ. P. 12(b)(6), arguing that, under *Wise*, the Knables had

waived their right to reimbursement because they did not request a due process hearing prior to placing Justin in Grove School. The district court denied Bexley's motion to dismiss, finding that *Wise* was factually distinguishable from the present case, relying in part on *School Committee of Burlington, Mass. v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

In light of the district court's order effectively overruling the SLRO's decision for purposes of determining whether the Knables had presented a claim for which relief could be granted, the parties stipulated that the district court's basis for review would be the decision of the IHO. Following a period of briefing and motions, the district court issued its opinion affirming the decision of the IHO in its entirety.

II. DISCUSSION

A. Overview of the IDEA[2]

1. Statutory framework

In exchange for federal funding, the IDEA requires states to identify, locate, and evaluate "all children residing in

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[2]The IDEA was amended effective June 4, 1997, *see* Pub. L. No. 105-17, Tit. II, §201(a)(2)(C), 111 Stat. 37, 156 (1997), and these amendments have prospective application only. *See Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 500-01 (6th Cir. 1998). The actions in this case cover periods under the prior law, and citations are to the prior law unless otherwise noted.

the State who are disabled . . . and who are in need of special education and related services . . . ." 20 U.S.C. §1412(2)(C) (1994). States must provide all such disabled children a "free appropriate public education" ("FAPE"), 20 U.S.C. §1401(a)(18), and school districts receiving funds under the IDEA must establish an IEP for each child with a disability, *see* 20 U.S.C. §1414(a)(5). Congress defined an IEP as follows:

> [A] written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child . . . .

20 U.S.C. §1401(a)(20). Under the Act, the IEP must contain a specific statement of the child's current performance levels, the child's short-term and long-term goals, the educational and other services to be provided, and criteria for evaluating the child's progress. *See id.* The meeting to develop an IEP must be held within thirty calendar days of a determination that the child needs special education and related services. *See* 34 C.F.R. §300.343(c) (1995). Placement decisions must be based on the IEP. *See* 34 C.F.R. pt. 300, app. C., cmt. 5. Furthermore, the IDEA requires the school district to review the IEP at least annually and to make any necessary revisions to ensure that the child is receiving an appropriate education. *See* 20 U.S.C. §1415(a)(5). Finally, the IDEA mandates that

children with disabilities be educated with non-disabled children "to the extent appropriate." 20 U.S.C. §1412(5); 34 C.F.R. §300.550.

2. Relief under the IDEA

The IDEA provides a process through which parents who disagree with the appropriateness of an IEP can seek relief. The process begins with a complaint to the school district, followed by a due process hearing at which parents are able to voice their concerns to an IHO of the state educational agency, as determined by state law. *See* 20 U.S.C. §1415(b). Any party may appeal the result of this hearing to an SLRO. *See* 20 U.S.C. §1415(c). Finally, any party aggrieved by the result of the hearing held before the SLRO may bring suit in the appropriate state court or federal district court. *See* 20 U.S.C. §1415(e)(2).

During the course of such proceedings, parents and the school are required to continue the then-current educational placement of the child as set forth in the current IEP. *See* 20 U.S.C. §1415(e)(3)(A). If, however, parents opt not to comply with this so-called "stay-put" provision, they are not necessarily barred from recovering the costs of private placement. Rather, parents who elect to remove their child from public school prior to completion of the IDEA review process, and pay for appropriate specialized education themselves, may seek reimbursement for the amounts expended. *See Burlington,* 471 U.S. at 370. Parents are entitled to such retroactive reimbursement "only if a federal court concludes both that the public placement violated the IDEA, and that the private school placement was proper under the Act." *Florence County,* 510 U.S. at 15. Thus,

parents who unilaterally remove their child from public school prior to completion of the IDEA review process "do so at their own financial risk." *Id.* (citing *Burlington,* 471 U.S. at 373-74).

When parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under the IDEA, a reviewing court must undertake a twofold inquiry. *See Bd. of Educ. v. Rowley,* 458 U.S. 176, 206-07 (1982). First, the court must ask whether the school district has complied with the procedures set forth in the IDEA. *See id.* Second, the court must determine whether the IEP, developed through the IDEA's procedures, is reasonably calculated to enable the child to receive educational benefits. *See id.* There is no violation of the IDEA so long as the school district has satisfied both requirements. *See id.*

3. Standard of review

The IDEA's provision governing federal court review of state administrative decisions states that: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. §1415(e)(2). The Supreme Court has construed this provision to mean that initial reviewing courts should make "independent decisions" based on the preponderance of the evidence, but also should give "due weight" to the determinations made during the state administrative process. *See Rowley,* 458 U.S. at 206. Although reviewing courts must

not "simply adopt the state administrative findings without an independent re-examination of the evidence," *Doe v. Metro. Nashville Pub. Schs.*, 133 F.3d 384, 387 (6th Cir. 1998), neither may they "substitute their own notions of sound educational policy for those of the school authorities which they review," *Doe v. Bd. of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 458 (6th Cir. 1993) (quoting *Rowley*, 458 U.S. at 206).

According to this "modified" *de novo* standard of review, a district court is required to make findings of fact based on a preponderance of the evidence contained in the complete record, while giving some deference to the fact findings of the administrative proceedings. *See Tucker*, 136 F.3d at 503. This court, in turn, applies a clearly erroneous standard of review to the district court's findings of fact, and a *de novo* standard of review to its conclusions of law. *See id.*

B. Procedural Violations

Under the first prong of *Rowley*, we must determine whether Bexley has violated the procedural requirements of the IDEA. Even if we conclude that Bexley did not comply with the Act's procedural requirements, such a finding does not necessarily mean that the Knables are entitled to relief. Rather, we must inquire as to whether the procedural violations have caused substantive harm to Justin or his parents. *See Metro. Bd. of Pub. Educ. v. Guest*, 193 F.3d 457, 464-65 (6th Cir. 1999); *Daugherty v. Hamilton County Schs.*, 21 F. Supp. 2d 765, 772 (E.D. Tenn. 1998). Only if we find that a procedural violation has resulted in such substantive harm, and thus constituted a denial of Justin's right to a FAPE, may we "grant such relief as the court

determines is appropriate." 20 U.S.C. §1415(e)(2).

1. Bexley failed to convene an IEP conference

As discussed *supra*, regulations enacted pursuant to the IDEA require a school district to convene a meeting to develop an IEP for a child within thirty calendar days of the determination that the child needs special education and related services. *See* 30 C.F.R. §300.343(c). This time limit ensures that there will not be a significant delay between the time the child is evaluated and the time the child begins to receive special education. *See* 34 C.F.R. pt. 300, app. C, cmt. 7. In addition, Ohio administrative regulations require school districts to conduct an IEP conference "as soon as possible," and, in any event, not more than ninety days after a child's parents consent to a multi-factored evaluation, or one hundred twenty days after school officials initially suspect the child as having a handicap, whichever comes first. *See* Ohio Admin. Code ("O.A.C.") §3301-51-02(E)(1)(c) (2000).[3]

Inasmuch as the Knables consented to Justin's multi-factored evaluation on September 30, 1993, Bexley was required to conduct an IEP conference for Justin no later than December 29, 1993. Bexley failed to do so. Bexley contends that the December 8, 1993, meeting between Bexley officials

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[3]It is unclear whether, under certain circumstances, the Ohio regulations may grant school officials a longer time period in which to conduct the IEP conference than that afforded by the federal regulations. Inasmuch as Bexley failed to comply even with the longer time limit provided by the Ohio regulations, we need not address this issue.

and the Knables was an IEP conference "for all intents and purposes." The district court found that that meeting was a "precursor" to an IEP conference but that it did not legally constitute an actual IEP conference. The record indicates that the purpose of the December 8, 1993, meeting was to inform the Knables of the results of Justin's multi-factored evaluation and to discuss Bexley's determination that Justin was suffering from a severe behavior handicap. There is no indication that the parties addressed the additional agenda items that comprise a formal IEP conference under the applicable regulations. *See* 34 C.F.R. §300.343; 34 C.F.R. pt. 300, app. C., cmts. 7-35; O.A.C. §3301-51-02(E)(1)(d). Specifically, there was no determination of the nature and degree of special education intervention needed for Justin, and no decision as to an educational placement for Justin. *See* O.A.C. §3301-51-02(E)(1)(d). Moreover, the meeting did not result in the production of an IEP document for Justin. *See id.* Rather, Bexley merely encouraged the Knables to consider the Hannah Neil program as a possible placement for Justin. Thus, the district court did not err in finding that the December 8, 1993, meeting was not an IEP conference.

Bexley argues, in the alternative, that even if it failed to convene an IEP conference for Justin within the applicable time period, such failure was due to the Knables' lack of cooperation with school officials. Bexley asserts that it was unable to convene a formal IEP conference until the Knables tentatively agreed to a proposed placement for Justin. Bexley felt that such a tentative agreement on the part of the Knables was required before an IEP conference could be convened because it believed that a representative from the proposed placement had to be present at the IEP conference under the governing administrative regulations. Bexley thus argues that

because the Knables refused to agree with school officials even tentatively about any proposed placements for Justin, the Knables effectively prevented Bexley from convening a formal IEP conference.

Bexley's argument fails, however. Although it is true that the regulations to which Bexley refers provide for the involvement of a representative from the proposed placement in the development of the IEP, *see* 34 C.F.R. §300.348(a)(2); O.A.C. §3301-51-02(D)(4), nowhere in the regulations is it required that the parents of a disabled child agree with the school district's proposed placement *before* an IEP conference can be held. To the contrary, the regulations expressly provide for the development of an IEP without parental involvement. *See* 34 C.F.R. §300.345(d); 34 C.F.R. pt. 300, app. C., cmt. 29; O.A.C. §3301-51-02(E)(3); *see also Cordrey v. Euckert,* 917 F.2d 1460, 1467 (6th Cir. 1990) (discussing proper procedure when school district is unable to convince parents to attend IEP conference). Bexley's position that it could not convene an IEP conference until it obtained the Knables' tentative approval of a proposed placement for Justin was erroneous, therefore, and does not justify Bexley's failure to conduct the IEP conference.

Thus, we find that the district court's conclusion that Bexley failed to convene an IEP conference for Justin was correct.

2. Bexley's procedural violation denied Justin a FAPE

This conclusion does not end our analysis, however. As discussed *supra*, a procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure

to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents. *See Guest,* 193 F.3d at 464-65; *Daugherty,* 21 F. Supp. 2d at 772. Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. *See W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1484 (9th Cir. 1992). In addition, procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA. *See Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992); *W.G.*, 960 F.2d at 1484.

Here, the district court found that Bexley's failure to convene an IEP conference did not constitute a substantive deprivation of Justin's rights under the IDEA. Specifically, the district court held that, "based on a preponderance of evidence in the record, any procedural violations committed by Bexley or the aggregation of the violations did not result in the denial of an FAPE." In reaching its conclusion, the district court emphasized that Bexley had afforded the Knables opportunities to become involved in the process of formulating an IEP for Justin. The court also pointed to the cooperation between Bexley officials and the Knables during Justin's hospitalization at Upham Hall between January 1993 and February 1994. In light of these facts, the district court concluded that Bexley's failure to convene an IEP conference did not seriously infringe on the Knables' opportunity to participate in the IEP process or deny Justin educational opportunity.

We review the district court's conclusion *de novo*, *see Tucker,* 136 F.3d at 503; *W.G.,* 960 F.2d at 1483 (holding question of whether child was denied FAPE is mixed question of law and fact that is reviewed *de novo*), and find that it is not borne out by the record. It is true that Bexley met with the Knables on several occasions to discuss Justin's behavioral problems and to review possible placement options for him. The record also reflects that Bexley worked with the Knables to ease Justin's transition from Upham Hall back to Bexley in February 1994. Such cooperation, however, is not the equivalent of providing parents a meaningful role in the process of formulating an IEP.

As discussed above, Bexley never convened an IEP conference for Justin. As a result, the Knables never were able to participate in an IEP conference. The IEP conference is the primary opportunity for parental involvement in the process of developing an IEP. *See* 34 C.F.R. §300.345(a); 34 C.F.R. pt. 300, app. C, cmt. 26 (stating that parents are intended to be "equal participants" and to play an "active role" in the IEP conference); *see also Doe v. Defendant I,* 898 F.2d 1186, 1191 (6th Cir. 1990) ("Adequate parental involvement and participation in formulating an IEP . . . appear to be the Court's primary concern in requiring that procedures be strictly enforced."). Bexley's assertion that the school district was unable to conduct an IEP meeting until the Knables had agreed to a placement for Justin does not excuse its failure to conduct an IEP conference. Because there was no IEP conference, Mr. and Mrs. Knable were denied any meaningful opportunity to participate in the IEP process. *See W.G.,* 960 F.2d at 1484.

Moreover, the absence of an IEP at any time during Justin's sixth-grade year caused Justin to lose educational opportunity. Because Bexley never convened an IEP conference for Justin during the 1993-94 school year, Justin had no IEP at all during that year. Consequently, Justin did not have "access to specialized instruction and related services" that were "individually designed to provide educational benefit." *Rowley,* 458 U.S. at 201. Without an IEP in place, Justin's behavior and academic performance suffered. Justin's inappropriate behavior became more frequent over the course of his sixth-grade year and his academic performance deteriorated. Bexley's failure to convene an IEP conference thus resulted in Justin losing educational opportunity.[4] *See Babb,* 965 F.2d at 108. Because Bexley's failure to convene an IEP conference both denied the Knables the opportunity to participate meaningfully in the IEP process and resulted in the loss of educational opportunity for Justin, we hold that the district court erred in concluding that Bexley's procedural violation did not constitute a denial of a

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[4]The IHO found that Justin's final grades for the sixth grade "clearly establish that the year was not a loss," and pointed to Justin's subsequent success at Grove School as evidence that he had received "a firm educational base" while at Bexley. These conclusions are not supported by the record, however. In the final grading period of his sixth-grade year at Bexley, Justin received Fs in writing, spelling, and mathematics, Ds in reading and social studies, and Cs in science and health. Moreover, the improvement that Justin displayed in seventh grade while at Grove School highlights Justin's responsiveness to a program that effectively addressed his educational and behavioral needs, needs not adequately addressed while he was at Bexley.

FAPE under the IDEA.[5]

C. Substantive Violations

Having concluded that, under the first prong of *Rowley*, Bexley denied Justin a FAPE by virtue of its procedural violation of the IDEA, we need not determine whether the draft IEP proposed by Bexley offered Justin an appropriate program. The IDEA's procedural framework clearly provides that there can be no IEP unless an IEP conference is conducted first. *See* 20 U.S.C. §1401(a)(20); 34 C.F.R. §300.343(c); 34 C.F.R. pt. 300, app. C; O.A.C. §3301-51-02(E). Because Bexley never convened an IEP conference, the "draft" IEP that Bexley presented to the

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[5]Bexley suggests that the Knables' reference to Justin's sixth-grade year (1993-94) is inappropriate inasmuch as the Knables' due process request challenges only the adequacy of the IEP proposed by Bexley for Justin's seventh-grade year (1994-95). It is true that the Knables' due process request did not concern Justin's performance in 1993-94. Inquiry into Justin's performance during the 1993-94 school year is proper, however, for the purpose of determining whether Bexley's failure to convene an IEP conference resulted in a substantive violation of Justin's rights. If so, Bexley has denied Justin a FAPE and the Knables are entitled to relief. Moreover, Bexley admits that Justin's performance during the 1993-94 school year is relevant in assessing the school district's proposed IEP for Justin's seventh-grade year. Finally, Bexley's failure to convene an IEP conference during the 1993-94 school year denied Justin's parents a meaningful opportunity to participate in the development of the proposed IEP covering the 1994-95 school year. Thus, reference to Justin's sixth-grade year is appropriate.

Knables on August 30, 1994, cannot properly be considered an IEP for the purposes of *Rowley*.

In *Babb*, this Court applied the first prong of *Rowley* and concluded that the school district failed to adhere to the procedural requirements of the Act. *See* 965 F.2d at 107. Specifically, *Babb* found that the school district failed to conduct a proper evaluation of the child and, consequently, failed to provide the child with an IEP. *See id.* The Court then turned to the second prong of the *Rowley* analysis and stated:

> [T]he school did not create an individualized educational program for Jason and did not meet Jason's specialized needs. Had the school properly complied with the Act's requirements . . ., the Babbs and the school system could have worked together to design a proper plan to best meet Jason's needs. The wisdom of hindsight in this instance, however, provides hollow comfort.

Id. at 108. As in *Babb*, the school district in this case failed to comply with the procedural requirements of the IDEA, resulting in a substantive deprivation of Justin's rights. As a consequence, there is no IEP for this Court to review under the second prong of *Rowley*.

However, even if we were to assume that Bexley substantially complied with the procedural requirements of the IDEA, we nonetheless would conclude that Bexley's proposed IEP of August 30, 1994, failed to provide a FAPE to Justin. As previously discussed, the second prong of

Rowley requires this Court to determine whether Bexley's proposed IEP was reasonably calculated to enable Justin to receive educational benefits. *See* 458 U.S. at 206-207. The party challenging the terms of an IEP bears the burden of proving that it is inappropriate. *Cordrey*, 917 F.2d at 1469.

1. Bexley's draft IEP must be evaluated as written

As an initial matter, we note that we must limit our evaluation of Bexley's proposed IEP to the terms of the document itself, as presented in writing to the Knables. The IDEA specifically requires school districts to provide parents a formal written offer before either initiating a placement for a disabled child or otherwise providing a FAPE to the child. *See* 20 U.S.C. §1415(b)(1)(C). In discussing the importance of the formal written offer requirement, the Ninth Circuit has noted that the requirement is not merely technical, but rather serves the important purpose of creating a clear record of the educational placement and other services offered to the parents. *See Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994). The written offer not only helps to eliminate factual disputes between the school district and parents about proposed placements, but also "greatly assists parents in presenting complaints with respect to any matter relating to the . . . educational placement of the child." *Id.* (internal quotation marks omitted). The written offer requirement should therefore be enforced rigorously. *See id.*

The district court expressly addressed the question of whether Bexley's proposed IEP offered an appropriate program for Justin and agreed with the IHO's assessment of the quality of the proposed IEP and the Harding School Plus program, holding that "Bexley *could* have provided a free

appropriate public education to meet Justin's specific needs . . . ." (emphasis added). The district court suggested that any unanswered questions resulting from deficiencies in the proposed IEP were the Knables' fault inasmuch as "Bexley offered 'continuing and abundant opportunities to the Knables to be involved in fashioning an IEP. . . .'"

The district court erred in relying on the IHO's finding that Bexley had the capacity to offer Justin an appropriate program. The district court should have limited its assessment to the terms of the draft IEP document itself. Although there was evidence in the record indicating what could have been provided at Harding, only those services identified or described in the draft IEP should have been considered in evaluating the appropriateness of the program offered. *See id.* at 1525-26 (considering only written placement offer in assessing appropriateness of program offered by school district); *see also Burilovich v. Bd. of Educ. of Lincoln Consol. Schs.*, 208 F.3d 560, 568 (6th Cir.) (holding that oral proposal by school district about what could be offered is not an IEP), *cert. denied*, 121 S. Ct. 380 (2000); *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998) (rejecting school district's argument that proposed IEP was "first draft" that would have been further developed had parents continued dialogue with school); *Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1256 (D. Vt. 1996) (finding that issue before the court was whether proposed IEP complied with the IDEA, not whether an IEP might have been developed that would have complied). Moreover, as discussed previously, the Knables' refusal to agree on a proposed placement for Justin does not justify Bexley's noncompliance with the IDEA. Thus, the only offer of placement that was appropriately before the district court

was that specified in Bexley's draft IEP dated August 30, 1994.

2. Bexley's proposed IEP did not offer an appropriate program

Under the IDEA, an IEP must include a statement of the child's present levels of educational performance, a statement of annual goals and short-term instructional objectives, a description of the specific educational services to be provided, a statement of needed transition services to be provided, the projected date of initiation of the program, and its expected duration. *See* 20 U.S.C. §1401(a)(20). Applicable federal regulations further provide that the written offer required by §1415(b)(1)(C) must include an explanation of the parents' procedural safeguards, an explanation of the school district's proposed actions, and a description of the evaluations and other records on which the agency based its proposal. *See* 34 C.F.R. §300.505. Under both the IDEA and interpretive case law, the IEP embodied in such a written offer must provide services that are individualized to the child's needs. *See* 20 U.S.C. §1401(a)(20); *Union Sch. Dist.*, 15 F.3d at 1525.

Bexley's draft IEP does not meet the requirements of the IDEA or its associated regulations. It does not contain a summary of the Knables' procedural rights. It fails to explain the options Bexley considered and the reasons why those options were rejected. It does not describe the evaluations, procedures, tests, records, or reports that Bexley used as a basis for its proposal. *See* 34 C.F.R. §300.505. Nor does the draft IEP substantially satisfy the requirements of 20 U.S.C. §1401(a)(20). *See* 30 [sic] C.F.R. pt. 300, app. C., cmts. 36-

44 (discussing what should be included in the statement of the child's present performance levels, the goals and objectives to be achieved, and the special educational and related services to be offered). Rather, Bexley's draft IEP is just that -- a draft. It is a generalized proposal of behavioral and educational goals for Justin, with minimal details describing how the Harding School Plus program would help Justin meet such goals. The proposed program was developed by Bexley based on general information received from Harding, rather than on specific information concerning which services would best meet Justin's individual needs. Dr. Hyland, the author of the draft IEP, repeatedly stated that the document sent to the Knables was "not an IEP." Bexley's expert witness, Dr. James Christopher, also testified that he "would want more" than the program embodied in the draft IEP to address Justin's behavioral and educational problems.

In addition, Bexley's draft IEP did not offer a free program. The draft IEP stated that "Bexley Schools will assume costs beyond what parent insurance will cover." The district court and the IHO both found that the IEP required the Knables to exhaust their own insurance coverage before Bexley would pay. Due to the lifetime coverage limits for psychiatric care under the Knables' family medical insurance plan, the district court found that Bexley's proposed arrangement would result in costs to the Knables. Despite this finding, the district court did not conclude that the IEP as written denied Justin a FAPE. Rather, the district court held that, to the extent the proposed IEP imposed costs on the Knables, such charges were barred by the IDEA. As already discussed, however, a reviewing court must evaluate the propriety of the IEP based on the terms of the written offer itself, not on what the school district could have provided.

For the purposes of determining whether the Knables are entitled to reimbursement, the district court's role was to determine whether the proposed IEP provided a FAPE at the time offered. *See Union Sch. Dist.*, 15 F.3d at 1525. As defined under the IDEA, a FAPE consists of "special education and related services . . . provided at public expense, . . . and *without charge*." 20 U.S.C. §1401(a)(18)(A) (emphasis added). By the express terms of the Act, therefore, Bexley's proposed IEP did not provide a FAPE. Inasmuch as Bexley's proposed IEP failed to meet both the technical and substantive requirements of the IDEA, it did not provide Justin a FAPE as written. The district court erred in assessing the appropriateness of the program offered by Bexley based on what Bexley might have provided, as opposed to what Bexley actually promised in the draft IEP. Standing alone, Bexley's proposal was insufficient to meet the requirements of the IDEA.

D. The Knables' Right to Reimbursement

When a court determines that a school district has violated a child's rights under the IDEA, it is authorized to grant "such relief as the court determines is appropriate." 20 U.S.C. §1415(e)(2). Under this provision, "equitable decisions are relevant in fashioning relief," *Burlington,* 471 U.S. at 374, and courts enjoy "broad discretion" in so doing, *id.* at 369. Appropriate relief includes the reimbursement of costs associated with the private school placement of the child. *See id.*; *see also Babb*, 965 F.2d at 109 (holding that when school system violated IDEA's procedural requirements, reimbursement for costs of private placement was proper remedy). In order to receive reimbursement for private school placement, however, parents must demonstrate

not only that the school district failed to provide a FAPE, but also that their own unilateral placement of the child in private school was proper. *See Boss*, 144 F.3d at 399 (citing *Florence County*, 510 U.S. at 7).

Inasmuch as the district court erroneously concluded that Bexley's proposed IEP was appropriate under the IDEA, it did not address the propriety of the Knables' placement of Justin at Grove School. In *Florence County*, the Supreme Court set forth the following standard for determining whether a unilateral placement is appropriate:

> [W]hen a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."

510 U.S. at 11 (citations omitted). The record before us amply demonstrates that Grove School satisfies this standard.

Grove School is a residential program for adolescents located in Connecticut and certified by the Connecticut Department of Education, the Connecticut Department of Children and Families, and the American Association of Psychological Services for Children. Each student at Grove School receives a Comprehensive Service Plan developed by a team including a therapist, a psychiatrist, teacher-counselors, and various administrators. Class sizes are small and students participate in frequent individual and group therapy sessions. Not surprisingly, Justin made significant educational progress during his two years at Grove School.

The record indicates that the frequency of Justin's inappropriate behavior significantly decreased during his first year at Grove and his grades improved dramatically.

Bexley contends that the Knables are not entitled to reimbursement because Grove School was not the "least restrictive" placement as required by the IDEA. *See* 20 U.S.C. §1412(5); 34 C.F.R. §300.550. We noted in *Boss*, however, that parents who have not been treated properly under the IDEA and who unilaterally withdraw their child from public school will commonly place their child in a private school that specializes in teaching children with disabilities. *See* 144 F.3d at 400 n.7. We would vitiate the right of parental placement recognized in *Burlington* and *Florence County* were we to find that such private school placements automatically violated the IDEA's mainstreaming requirement. *See id.*

Bexley further argues that reimbursement is inappropriate because it would impose substantial costs on the school district when compared to the cost of the program offered by Bexley. The Court in *Florence County* expressly rejected this argument, however, and held that once parents prove that the school district failed to offer an appropriate program, parents are entitled to reimbursement for private school placement so long as the placement was reasonably calculated to provide educational benefits. *See* 510 U.S. at 11. The Court stated:

> There is no doubt that Congress imposed a significant financial burden on States and school districts that participate in the IDEA. Yet public educational authorities who want to

> avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is the IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Id. at 15.[6]

In concluding that the Knables are entitled to reimbursement for the reasonable costs associated with Justin's education at Grove School, we are mindful of the Court's mandate in *Burlington* that equitable considerations are relevant in fashioning relief under 20 U.S.C. §1415(e)(2). *See* 471 U.S. at 374. Thus, on remand, the

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[6]Bexley contends that school districts are not required to "maximize the potential of handicapped children" under the IDEA, *Rowley,* 458 U.S. at 189, and argues that ordering reimbursement would unfairly require the school district to provide Justin the "educational equivalent of a . . . Cadillac," *Tullahoma City Schs.*, 9 F.3d at 459. The case law to which Bexley refers, however, addresses only the question of whether a school district's proposed IEP sufficiently comports with the requirements of the IDEA. These cases do not affect our analysis of whether parents are entitled to reimbursement for the costs private placement [sic] once they have shown that the school district failed to offer an appropriate program. To the contrary, having shown that Bexley did not provide Justin a FAPE, the Knables need only demonstrate that Grove School was reasonably calculated to enable Justin to receive educational benefits. *See Florence County,* 510 U.S. at 11.

district court "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Florence County,* 510 U.S. at 16. Total reimbursement of the costs of Justin's Grove School education will not be appropriate if the court determines such costs to be unreasonable. *See id.*; *see also Gadsby v. Grasmick,* 109 F.3d 940, 955 (4th Cir. 1997) (holding that under *Florence County*, the district court is free on remand to award reimbursement only for those costs that it deems are reasonable). In any event, it is the district court's role in the first instance to weigh the equities in this case to determine the appropriate level of reimbursement to be awarded. *See Gadsby,* 109 F.3d at 955.

E. Issues on Cross-Appeal

Bexley raises two additional issues on cross-appeal, which may be disposed of succinctly. First, Bexley argues that the district court erred in refusing to allow into evidence the deposition testimony of psychologist Jack Naglieri, Ph.D., on the issues of whether Bexley's proposed IEP was appropriate and whether Grove School was an appropriate placement for Justin. The district court, mindful of the role of the administrative hearing in the IDEA relief process, rejected Bexley's proffer of that testimony on the basis that Dr. Naglieri's evaluation occurred after the IHO's hearing and could not have been considered at that hearing because he was hired by Bexley in 1997. The district court also found that the proffered testimony was duplicative of the evidence presented by Bexley at the IHO's hearing.

In discussing the proper standard of judicial review with respect to supplementing the administrative record under

the IDEA, we have said:

> [T]he reasons for supplementation [of the administrative record] will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative hearing.

Metro. Gov't v. Cook, 915 F.2d 232, 234 (6th Cir. 1990) (internal quotation marks omitted). In light of this standard, we find that the district court did not abuse its discretion in refusing to admit Bexley's additional evidence. *See id.*

Finally, Bexley argues that the Knables cannot maintain an IDEA action against Phillip E. Tieman, the Superintendent of Bexley Schools, in his individual capacity. The Knables do not address this question in their briefs, and the district court did not address it in its opinion. As such, Bexley's argument appears to be unopposed, and Superintendent Tieman should be dropped as a party to this case. *See James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 769 (6th Cir. 2000) (holding that claims against school officials are not proper under the IDEA absent claim that officials failed to act in fulfillment of statutory duties).

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the decision of the district court and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed January 24, 2001]

Nos. 99-4326; 99-4394

JUSTIN KNABLE, a minor by and through his mother and next friend Marilyn Knable,
Plaintiff-Appellant/Cross-Appellee,

v.

BEXLEY CITY SCHOOL DISTRICT; and PHILLIP E. TIEMAN, Superintendent, Bexley Board of Education,
Defendants-Appellees/Cross-Appellants.

Before: KEITH, BOGGS, and COLE, Circuit Judges.

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus

JUDGMENT

THIS CAUSE was heard on the record from the district court and argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with

the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

[Filed September 30, 1999]

No. C2-96-1159

Justin Knable, et al	)
	)
vs.	)
	)
Bexley City School District, et al	)
	)

Judge Edmund A. Sargus, Jr.
Magistrate Judge King

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☒ **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order of September 30, 1999, the plaintiff's motion for judgment on the pleadings is GRANTED in part and DENIED in part. Defendant's motion for summary judgment is GRANTED in part and DENIED in part. JUDGMENT is entered AFFIRMING the decision of the Impartial Hearing Officer.

Date: September 30, 1999

Kenneth J. Murphy, Clerk

/s/_____
By Peg Lambert/Deputy Clerk

I.

A. STATEMENT OF THE FACTS

The facts of this case are largely undisputed. Justin Knable was born on February 3, 1982. When Justin became of school age, his parents, Marilyn and Robert Knable, enrolled him in a private school, Columbus Torah Academy. Justin began exhibiting behavioral problems in the first grade, and began receiving private therapy from Dr. David Demuth. (Tr. 35-37.) Justin continued to exhibit inappropriate behavior, and began seeing Dr. Switkin, a child psychologist associated with the Torah Academy. In early 1992, Dr. Switkin diagnosed Justin with Attention Deficit Hyperactivity Disorder ("ADHD"). Upon a second opinion, Dr. Stella Kontras also diagnosed Justin with ADHD, as well as oppositional defiant disorder, and dysthymia. (Tr. 40-42.) Justin was prescribed medication for his condition. (Tr. Add. 32, Tr. 40-41.) He was admitted to Upham Hall, an inpatient facility at The Ohio State University from June 8, 1992 through June 19, 1992 because of his aggressive behaviors at home. (Exhs. 1, 54.) No educators were involved in the decision to place Justin in Upham Hall. (Tr. 137.)

Justin attended the Torah Academy through the fourth grade. (Tr. 33.) He began attending Bexley City schools in the fifth grade (1992-93 school year) because the Knables, in consultation with Dr. Switkin, decided that Justin should be placed in a more disciplined and more structured educational environment. (Tr. 48-49.) By December of that year, Justin again displayed disruptive behavior in the classroom. Bexley officials consulted with Dr. Kevin Arnold, a private psychologist, regarding Justin's behaviors at school. (Tr.

534.) Dr. Arnold recommended professional observation and testing. He raised inpatient placement as one possibility in a series of several. (Exh. 108, p. 32.)

At the beginning of Justin's sixth grade year, 1993-94, Bexley began the process of having Justin evaluated according to special education law. (Exh. 109, pp. 15-16.) As early as August 31, 1995, a Teacher Conference Summary states, "call Knables for permission to evaluate." Bexley officials signed a referral request on September 14, 1993, and mailed a parent permission form on September 24, 1995. (Exh. 109, 13, 15-16.) An evaluation team met on November 22, 1993 and unanimously agreed that Justin was eligible for services for a Severe Behavior Handicap ("SBH"). (Tr. 540, Exh. 16.) Nadine Ross, the school psychologist, sent the results of the multi-factored evaluation to Mr. and Mrs. Kaable on November 23, 1993, and arranged a meeting with them to discuss the evaluation and possible placements for Justin. (Tr. 1148.)

Bexley did not have an SBH unit within the district in 1995. (Tr. 1248.) At the instructions of Dr. David Hilliard, Ms. Ross investigated the availability of SBH placement settings for Justin outside the Bexley district, including the Hannah Neil Center for Children ("Hannah Neil"). (Tr. 1104.) Ms. Ross reviewed the Hannah Neil program, and learned that the program had space for an additional SBH student. (Tr. 1148.)

At the meeting, which was held December 8, 1993, the Knables and Bexley representatives discussed the SBH status and possible options for Justin. Dr. Hilliard recommended to the Knables an SBH placement for Justin at

Hannah Neil. (Exh. 109, p. 54, 55-57; Tr. 1105.) The Knables expressed doubt about the Hannah Neil program and raised the possibility of a residential setting for Justin. (Tr. 1103.) Bexley officials had not considered recommending a residential setting for Justin. (Tr. 1103.) The Knables agreed to visit the Hannah Neil facility. (Exh. 109, pp. 54, 57 & 59.) The Knables never talked with staff at Hannah Neil nor did they visit Hannah Neil. (Tr. 192.)

On December 13, 1993, the Knables admitted Justin to Upham Hall because of aggressive behavior at home. (Exh. 65, p. 1) The Knables informed Dr. Hilliard at Bexley that Justin had been hospitalized and requested another meeting. (Tr. 908.) At the meeting, Mr. Knable stated that Hannah Neil was not an acceptable placement for Justin. (Tr. 911-12; Exh. 109, p.61.) Mr. Knable and Bexley officials agreed at the meeting that Bexley would work with Mary Sidman at Upham Hall on Justin's educational program while he was hospitalized. (Tr. 917.)

Justin remained in inpatient treatment at Upham Hall from December 13 through 22, 1993, and continued day treatment from January 3, 1994 through February 25, 1994. Mary Sidman's Education Placement Recommendations included suggestions that Justin return to the present regular education program, but "[i]f J.J.'s return to the regular classroom is unsuccessful, SBH programming either in a public setting or in a day treatment/residential facility should be considered." (Exh. 3, p.4.) Justin returned to regular education placement at Bexley with a behavior plan. The plan was modified after Justin sent a note to his teacher threatening to run away and stating that he almost slit his wrists because of embarrassment. (Exh. 110, p. 89; Tr. 608.) Justin was

doing almost no work at school, spent a great deal of time in the principal's office, and failed three of his seven subjects. (Tr. 610-11; Exh. 22, 106, 110.) At school, he was disrespectful to teachers and students, swore regularly, and disrupted class by talking. Justin was not behaviorally out of control at school, although the Knable's viewed Justin's behavior at home to be explosive and uncontrollable at times.

During all of these tumultuous times, the Knables and Bexley officials met for additional meetings on April 6, 1994 and June 8, 1994. Further, Bexley officials were examining other facilities that might serve as an SBH placement for Justin. (Tr. 557, 1165-1178.) In addition to the Hannah Neil program, Ms. Ross from Bexley contacted Rosemont, the Franklin County Board of Education, the Buckeye Boys Ranch and Harding School Plus as possible placements for Justin. (Tr. 553-554.)

The Knables raised the issue of an individual educational program ("IEP")[1] for Justin during the meetings of December 8, 1993, December 14, 1993, April 6, 1994, and June 8, 1994. (Tr. 801, 8111, 827, & 837.) Bexley did not convene a formal IEP meeting.

The Knables were themselves pursuing residential placement for Justin, including boarding schools and military academies, over this entire period, but beginning at least prior to the November 1993 determination of his SBH status. On or about August 16 and 17, 1993, Mrs. Knable completed

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[1]The school had a duty to establish an individual educational program ("IEP") for the child. 20 U.S.C. § 1414(a)(5).

enrollment and student information forms for Grove School, a psychiatrically-oriented residential program in Connecticut. (Tr. 853, 932, Ex. 119, pp. 3, 5-8.) The Grove School officially accepted Justin into the program on August 18, 1994 at a total enrollment cost of $51,300 per year. (Tr. 934; Exh. 120, p.2.) On that same day, Mr. Knable faxed a letter to Dr. Hyland at Bexley requesting a written IEP. (Exh. 122.)

At the beginning of the 1994-94 school year, Bexley still had not convened an IEP meeting. (Tr. 509.) On August 30, 1994, Bexley sent the Knables a "draft" proposed IEP. (Exh. 6.) The draft IEP proposed services at Harding School Plus, a program connected to a local psychiatric hospital. The draft IEP noted that "Bexley Schools will assume costs beyond what parent insurance will cover associated with the Harding School Plus program." (Exh. 6, p.2)(emphasis added.) The Knables visited the Harding School Plus, and at a follow-up meeting with Dr. Hyland, raised concerns about the shorter length of a school day in the program and the therapy costs of $80.00 per day. Mr. Knable asked whether Bexley would pay for private residential placement in the event the Knables did not agree to Harding School Plus. (Tr. 848.)

The Knables did not inform school officials of their decision to send Justin to Grove School. (Tr. 974.) The Knables did not inform Dr. Hyland about their concern over the insurance portion of the draft IEP.

On September 15, 1994, Dr. Hyland wrote a follow-up letter to the Knables. On September 20, 1994, the Knables' attorney responded and requested an IEP conference. (Tr. 975, Exh. 130.)

Justin attended Grove School for two years. By the fourth marking period of the seventh grade at Grove School, Justin achieved all A's and B's on his report card. (Exh. 102.)

B. PROCEDURAL HISTORY

The Knables requested a due process hearing on January 31, 1995 seeking reimbursement for the costs of placing Justin at Grove School. A due process hearing was conducted on September 7, 8, 11 and 12, 1995. On June 5, 1996, the Impartial Hearing Officer ("IHO") rendered his decision. The IHO found that Bexley's failure to comply with the procedural requirements of the IDEA and state law negated any deference that would otherwise be afforded to Bexley's proposed IEP and shifted the burden to Bexley to prove that the proposed IEP was appropriate. The IHO found as follows:

1. The Knables have prevailed in establishing that Bexley did not convene an IEP conference.

2. Bexley has prevailed in establishing that it can provide a free appropriate public education to meet Justin's specific needs. Bexley is not responsible to pay the costs of placing Justin at Grove School or at any other residential facility.

3. The Knables have prevailed in establishing that any charges for services provided to Justin under the proposed IEP that would reduce the family's lifetime coverage limits under their family medical insurance would deprive Justin

> of a free education and are therefore impermissible. Neither the Knables nor their family medical insurer are responsible to pay such charges.
>
> 4. Bexley has prevailed in establishing that a residential placement is not required to provide a FAPE to Justin.

(IHO Decision, p. 35.)

Both parties requested a state level review of the IHO's decision. On October 11, 1996, the State Level Review Officer ("SLRO") issued his decision. The SLRO reversed the decision of the IHO due to its purported conflict with Wise v. Ohio Dep't of Educ., 80 F.3d 177 (6th Cir. 1996.)

On November 12, 1996, the Knables filed this action appealing the SLRO's decision. On January 10, 1997, Bexley filed a Motion to Dismiss, arguing that, under the Wise decision, the Knables waived their right to reimbursement because they did not request a due process hearing prior to placing Justin at Grove School. The Court denied the Motion, finding that Wise is factually distinctive from the present case, as a matter of pleading only, relying in part on Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985), and Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). (Opinion and Order, July 26, 1997.)

Following a period of briefing and motions, the parties came before the Court on July 6, 1999 and agreed to a procedural stipulation. In light of the previous Order effectively overruling the SLRO's decision based on Wise for

purposes of determining whether the Knables had presented a claim for which relief could be granted, the parties agreed that the Court would use the decision of the IHO as the basis for its review. The parties were permitted an additional opportunity to brief so as to concentrate their arguments on the IHO's decision. The matter is now ready for disposition.

II.

A. OVERVIEW OF IDEA[2]

In exchange for federal funds, the IDEA requires states to identify, locate, and evaluate "all children residing in the State who are disabled . . . and who are in need of special education and related services. . . ." 20 U.S.C. § 1412(2)(C). The IDEA requires states to provide children with special needs and disabilities a free and appropriate public education. 20 U.S.C. § 1401(a)(18). The IDEA defines a "free appropriate public education" ("FAPE") as special education and related services that--

> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> (C) include an appropriate preschool, elementary, or secondary school

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[2]This Order refers to the statute in effect at the time the due process request was brought, and not the statute, as amended in June, 1997, and presently effective.

> education in the State involved, and
>
> (D) are provided in conformity with the individualized education program . . . required under section 1414(a)(5) of this title.

20 U.S.C. § 1410(a)(18). The school has a duty to establish an individual educational program ("IEP") for the child. 20 U.S.C. § 1414(a)(5).[3] Each IEP must set forth, among other things, the child's current abilities, a description of the services to be provided, and progress goals.[4] 20 U.S.C.

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[3]Congress defined an IEP as follows:

> a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardians of such child, and, whenever appropriate, such child . . . .

20 U.S.C. § 1401(a)(20).

[4]An IEP must contain:

> (A) a statement of the present levels of educational performance of such child,
> (B) a statement of annual goals, including short-term instructional objectives,
> (C) a statement of the specific educational services to be provided to such child, and the extent to

§ 1401(a)(20). A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services. 34 C.F.R. § 300.343(c). Placement decisions must be based on the IEP.[5]

> which such child will be able to participate in regular educational programs,
> (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,
> (E) the projected date for initiation and anticipated duration of such services, and
> (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(20).

[5]The Appendix to 34 C.F.R. Part 300 provides:

> The appropriate placement for a given child with a disability cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore the IEP must be developed before placement.

Moreover, the school must review the IEP at least annually and make any necessary revisions to ensure that the child is receiving an appropriate education. 20 U.S.C.§ 1414(a)(5). Finally, the IDEA mandates that children with disabilities be educated with non-disabled children "to the maximum extent appropriate." 20 U.S.C. § 1412(5); 34 C.F.R. § 300.550.

The IDEA provides a relief system through which parents who disagree with the appropriateness of a proposed IEP can convey their concerns. The process begins with a complaint to the school district, followed by due process hearing at which the parents are able to voice their concerns to an impartial hearing officer of the state educational agency as determined by state law. 20 U.S.C. § 1415(b). Any party may appeal the result of this hearing to a state level review officer. 20 U.S.C. § 1415(c). Finally, any party aggrieved by the result of the hearing may bring suit in the appropriate state or federal district court. 20 U.S.C. § 1415(e)(2).

During the course of these proceedings, parents and the school are required to continue the then current educational placement of the child as set forth in the current IEP. 20 U.S.C. § 1415(e)(3)(A). This prerequisite of the IDEA is sometimes referred to as the "stay-put" provision. Because of the time-consuming nature of the review process, however, the Supreme Court held that parents who, before completion of that process, elect to pay for appropriate specialized education themselves may seek reimbursement of the amounts expended. Burlington, 471 U.S. at 370. Parents

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Appendix C to 34 C.F.R. Part 300.

who neglect to follow the grievance procedures set forth in 20 U.S.C.A. § 1415 may render their children ineligible for free appropriate public education. Florence County Dist. Four v. Carter, 510 U.S. 7 (1993)(citing Burlington, 47I U.S. at 373-74). "They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act." Florence County, 510 U.S. at 15. This is true because IDEA defines "free appropriate public education" as education "provided in conformity with the [IEP] required under § 1414(a)(5) of this title." 20 U.S.C.A. § 1401(a)(18)(D). When parents unilaterally change their child's educational placement by taking him or her out of the then current placement, the child is not receiving education in "conformity with the" IEP specifically devised for him. Wise v. Ohio Dept. of Educ., 80 F.3d 177, 184 (6th Cir. 1996).

B. STANDARD OF DEFERENCE UNDER THE IDEA

The IDEA defines the scope of a court's review as follows: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The Supreme Court has noted that the initial reviewing courts should make "independent decisions" based on the preponderance of the evidence but should also give "due weight" to the state administrative proceedings. Board of Educ. v. Rowley, 458 U.S. 176 (1982). There, the Court described the appropriate standard of review:

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings." . . . Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State compiled with the procedures set forth in the Act? . . . And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? . . . If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 458 U.S. at 206-07 (footnotes omitted). Courts are to conduct a modified de novo review. Doe v. Board of Educ of Tullhoma City Sch., 9 F.3d 455,458 (6th Cir. 1993), cert. denied, 511 U.S. 1108 (1994).

III.

A. MOTION TO SUBMIT ADDITIONAL EVIDENCE

Defendants move the Court, pursuant to Section 1415(i)(2)(B) of the IDEA, for an Order permitting them to submit additional evidence. Defendants seek to submit the deposition testimony of Jack Naglieri, Ph.D., a psychologist, on the issue of whether Bexley's proposed IEP was appropriate, and whether the Grove School was appropriate and the least restrictive placement for Justin.

In ruling on the Motion to Supplement, the Court first considers the standard of judicial review, as described above and set forth in Rowley. Specifically, with reference to supplementing the administrative record, the Sixth Circuit has noted,

> [T]he reasons for supplementation [of the administrative record] will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability to a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

Metropolitan Gov't of Nashville & Davidson Cty. v. Cook, 915 F.2d 232, 234 (6th Cir. 1990)(citing Burlington v.

Department of Educ., 735 F.2d 773,790 (1st Cir. 1984), aff'd 471 U.S. 359 (1985)).

This Court has already once ruled on the admissibility of additional evidence as proposed by Plaintiff. (See Opinion and Order, June 16, 1998.) The Court concluded that admissible "additional evidence" would not relate to events that occurred subsequent to the administrative proceedings, nor would such evidence be merely repetitive of evidence presented at the administrative agency. On that basis, the Court excluded twenty-nine (29) supplemental exhibits and testimony pertaining to events that occurred subsequent to Justin's placement at the Grove School, including the opinions of psychologists regarding Justin's development after placement; testimony from several witnesses regarding Bexley's alleged failure to provide Justin with an FAPE, and other evidence which would have been obtained through discovery. Moreover, the Court addressed the specific testimony of Dr. Naglieri which is the subject of the instant Motion by separate Order dated September 24, 1998. There, the Court determined that Defendants were not obligated to move for admission of Dr. Naglieri's testimony prior to his deposition, but that the Court could not make a final determination of the admissibility his proposed testimony in the absence of a proffer. The Court now renders it decision on admissibility.

The additional evidence which the court accepted in Cook was evidence that could have been considered at the administrative level in the first instance, and as that court found, was evidence that "[did] not undercut the statutory role of the administrative process." Cook, 915 F.2d at 234. In contrast, the evidence proposed now by Defendants consists

of testimony and evaluations from Dr. Naglieri regarding Justin that occurred after the administrative process was complete. Dr. Naglieri was not hired until the summer of 1997. His testimony could not have been considered and weighed in the first instance during the administrative process along with the other expert testimony which was presented at the 1995 hearing.[6]

Again, the Court is cognizant of its role of judicial review in this IDEA matter, and endeavors to prevent an inappropriate substitution of its own judgment for "sound educational policy." Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 624 (6th Cir. 1990). The determination of whether to admit additional evidence is discretionary, and must be carefully made so as "not to allow such evidence to change the character of the hearing from one of review to a trial de novo." Cooke, 915 F.3d at 234. With these considerations firmly established and weighed, the Court exercises its discretion and will deny Defendants' Motion.

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[6]Dr. Naglieri's testimony also is duplicative of evidence presented at the administrative level. The Court notes that, during the administrative hearing, Defendants offered the expert testimony of Dr. Christopher on the issue of the appropriateness of the proposed IEP and the appropriateness of Plaintiffs' decision to place Justin in a private residential school. That testimony is part of the administrative record, and is presently before the Court.

B. PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[7]

The parties each address different portions of the IHO decision with which they take exception. The Court therefore wilt turn to each decision of the I'HO and the parties various arguments with respect to each.

1. The Knables have prevailed in establishing that Bexley did not convene an IEP conference.

The IHO specifically addressed the issue of whether Bexley followed applicable federal and state requirements in developing the proposed IEP. He concluded that Bexley failed to convene an IEP conference.

Ohio law requires a school district to develop an IEP not later than 90 days after parents have consented to a multifactored evaluation ("MFE"), or not later than 120 days after the initial referral as a suspected handicapped child, whichever comes first. Ohio Admin. Code ("O.A.C. ") § 3501-51-02(E)(1)(c). Federal and state law require that an IEP meeting be held within 30 calendar days of a determination that the child needs special education and related services. 34 C.F.R. § 300.345(c); O.A.C. § 5301-51-

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[7]Defendants have captioned their motion as one for summary judgment. The Court is not concerned with the captions the parties have chosen for their motions, but instead views its task of reviewing the IHO decision under the standards set forth above in Section II.

02(E)(1)(e).

The IHO concluded that the record was not clear as to when Justin was initially referred as a child who may require special education. He concluded, however, that the record clearly demonstrated that the Knables consented to the MFE on September 30, 1993, (Exh. 109, p. 16), and therefore Bexley was required to conduct an IEP conference with the Knables no later than ninety (90) days after September 30, 1993. The IHO found that Bexley failed to do so. Instead, he found that Bexley conducted a meeting on December 8, 1993 between the Knables and Bexley's Intervention Assistance Team, prior to which a representative of Bexley contacted Hannah Neil, but that this meeting was not an IEP conference. He concluded that this. conference was a "precursor" to an IEP meeting.

The Court agrees with the IHO that Bexley did not convene an IEP conference, and that the December 8, 1993 meeting did not legally constitute the requisite IEP team conference. The December 8, 1993 meeting was convened to present the Knables with the results of the MFE. The Knables asked questions regarding Justin's new status as "severe behavior handicapped" and inquired about the implications of that label. At that meeting, Bexley encouraged the Knables to consider the Hannah Neil program. The Knables countered by suggesting a residential placement for Justin, which Bexley had not considered.

Bexley contends that any failure to conduct the IEP meeting within the requisite ninety days was due in large part to the Knables own conduct. Bexley asserts that the Knable's failure to agree on a placement contributed to its failure to

provide with an IEP conference. However, "[t]he appropriate placement for a given child with a disability cannot be determined until after . . . the IEP meeting. . . ." 34 C.F.R. Part 300, Appendix C. At that point, because Bexley had not convened the IEP conference, the parties did not, and could not have known what Justin's individual needs were so as to determine what placement would have been appropriate. Moreover, the Knable's refusal to reach agreement with Bexley on a placement facility does not justify Bexley's failure to conduct the IEP conference.

The Knables argue that the failure to propose even a draft IEP until August 30, 1994 amounts to a procedural violation of the IDEA and denied Justin a free and appropriate public education ("FAPE"). In essence, they argue as they did before the IHO that the procedural violations committed by Bexley resulted in a substantive deprivation of Justin's right to a FAPE. Bexley vigorously argues that any procedural violations were de minimis and occurred as a result of the Knables' own actions.

A procedural violation is not a per se violation of the IDEA. Technical defects do not result in a violation of the IDEA in the absence of substantive deprivation. See Myles S. v. Montgomery Cty. Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1993)(finding school district substantially complied with IDEA despite failure to develop IEP before school year began or within 30 days of determination that student was eligible). The Knables contend that the procedural violations here are more than de minimis, and in fact are so egregious that Justin was denied an FAPE.

The Court concludes that the procedural violations that Bexley committed did not amount to a denial of an FAPE. Procedural errors which deprive a student of an individualized education program or result in the loss of educational opportunities may be properly viewed as substantive denials of free and appropriate educations under the IDEA. See Babb v. Knox County Sch. Sys., 965 F.2d 104 (6th Cir.), cert. denied, 506 U.S. 941 (1992). Moreover, procedural violations which seriously infringe upon the parents' opportunity to participate in the IEP process may rightly be viewed as a denial of FAPE. See W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479 (9th Cir. 1992). These circumstances simply are not present here.

After Justin had been identified as SBH, Bexley afforded the Knables significant opportunities to become and stay involved in the process of formulating an IEP. After the process began and the meeting was convened on December 8, 1993, the Knables found it necessary to place Justin in Upham Hall. The Court certainly does not question the wisdom of the family's decision to place Justin in an inpatient facility at a time when he was explosive at home. But, the record bears out the Mr. Knable [sic] rejected the Hannah Neil placement option on December 14, 1993. The parties agreed to work with the staff of Upham Hall to design a program for Justin until he was released in February, 1994. While these events were transpiring, the deadline for conducting the IEP conference expired. Moreover, Bexley continued to work with the Knables throughout Justin's sixth grade year to formulate an IEP.

The Court concludes that, based on a preponderance of evidence in the record, any procedural violations

committed by Bexley or the aggregation of the violations did not result in a denial of an FAPE. The IHO's decision in these respects is affirmed.

2. Bexley has prevailed in estabishing that it can provide a free appropriate public education to meet Justin's specific needs. Bexley is not responsible to pay the costs of placing Justin at Grove School or at any other residential facility.

Again, the IDEA requires that, in order to receive funds, the state must provide a child with disabilities a "free appropriate public education." 12 U.S.C. § 1412 [sic]. An appropriate education is one that provides "personalized instruction with sufficient support services to permit the child to benefit educationally." Rowley, 458 U.S. at 189.

The record makes amply clear that Justin is disabled for purposes of the IDEA. The parties do not dispute that he had been diagnosed with ADHD, oppositional defiant disorder, and dysthymia. Likewise, the parties do not dispute that he has been identified as SBH. His disability does affect his ability to learn. Bexley's proposed IEP must thus be "aimed at addressing the particular disabilities from which [Justin] suffers." Doe v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, 459 (6th Cir. 1993). The Court must assess whether Bexley's proposed IEP was appropriate and whether Grove School was an appropriate placement for Justin. Florence Cty. Sch. Dist., 510 U.S. at 15.

The preponderance of the evidence reveals that Justin's behavior at school during the sixth grade was limited

to being disrespectful to teachers and fellow students, swearing, having poor organizational skills and disrupting class by talking. He was not behaviorally out of control at school. He completed the sixth grade and had sufficient foundation from that year to achieve all A's and B's by the fourth marking period of his seventh grade year at the Grove School.

In recognition of the expertise of the hearing officers at the administrative level, and after examining the hearing officer's resolution of each material issue, the Court accepts the IHO's findings in whole with respect to the appropriateness of the proposed IEP. The Court agrees with the IHO that the preponderance of the evidence of record demonstrates that the proposed IEP is aimed at addressing Justin's particular disabilities and that the Harding School Plus program would have been appropriate for him.[8]

Harding had an SBH, school-day program with a psychiatrist on staff who could monitor Justin's medications. The teachers were qualified to teach SBH students. Some of

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[8]The parties make much of the IHO's decision to shift the burden to Bexley to demonstrate that the proposed IEP was appropriate. Because the Court concludes that the proposed IEP was appropriate based on its review of the record as a whole upon this modified de novo review, the Court need not determine which party should have carried the burden of proof on this issue. At the same time, the Court acknowledges that the State's placement decision is not entitled to greater deference because Bexley violated some of the procedural requirements of the Act. Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

the students already enrolled in the program suffered from ADHD and oppositional defiant disorder. The program included elements of individual and family therapy, psychological and behavioral modification programs, and other treatments. The proposed IEP, including the placement option at Harding, addressed the specific behavioral problems Justin exhibited, and contained goals for Justin to accomplish.

The Knables argue that the IHO's decision does not take make [sic] specific findings about Justin's unique needs. The Knables fault the draft IEP and the Harding Plus program as having several deficiencies, including the purported failure to address such items as the definite hours per day or number of months for the duration of the program; the family's view; accommodations to address Justin's ADHD; etc. (Pl's Memo. on Deference, p. 12-13.) The IHO, however, specifically assessed the quality of the proposed IEP and the Harding Plus program, and his decision in this regard is entitled to some deference.

The Knables argue that the proposed IEP was not complete, and that the Court should not review some fictitious IEP that Bexley "could have" provided. The Court notes that it agrees with the IHO that Bexley offered "continuing and abundant opportunities to the Knables to be involved in fashioning an IEP. . . ." (IHO Dec., p.31.) The Knables did contribute to unanswered questions about the IEP because they refused to consider anything but residential placement for Justin.

The Knables contend that only residential placement was the appropriate education which would address Justin's needs. They contend that Justin's long history of unsuccessful

interventions by professionals demonstrates that a 24-hour-a-day residential placement was required. The Knables provide facts detailing Justin's behavioral problems and prior treatment and ask the Court to conclude on its own that Harding was not appropriate and Grove School was. They rely on Dr. Quinn's testimony that a 24-hour-a-day program was necessary for Justin because he was "behaviorally out of control in all areas." (Tr. 332; 349-50.)

For the same reasons that the IHO discounted Dr. Quinn's testimony, the Court also concludes that her testimony is not supported on the record. Justin's behavior at school cannot fairly be said to be "out of control."[9] Moreover, a free appropriate education does not require more than what is "sufficient to confer some educational benefit upon the handicapped child." Rowley, 458 U.S. at 200. The Court agrees that Bexley could have provided a free appropriate public education to meet Justin's specific needs, and that Bexley is not responsible to pay for the costs of placing Justin at the Grove School.

3. **The Knables have prevailed in establishing that any charges for services provided to Justin under the proposed IEP that would reduce the family's lifetime coverage limits under their family medical insurance would deprive Justin of a free education and are**

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[9]The Court does not question the explosive quality of his behavior at home such that the Knables twice had to admit Justin to Upham Hail.

therefore impermissible. Neither the Knables nor their family medical insurer are responsible to pay such charges.

The IDEA requires that a student with disabilities must receive a free appropriate public education, consisting of special education and related services. 20 U.S.C. § 1401(18). The free education must be provided at public expense. Id. In addition, 34 C.F.R. § 300.301(b) provides: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability."

The law is clear that Bexley could not require the Knables to use their insurance to pay for Justin's educational placement if it would affect their lifetime coverage limits. 20 U.S.C. § 1401(18). Payments by the Knables' insurance carrier which reduce the dollar amount of the lifetime coverage limits available under their insurance policy, therefore, are "costs" to them. The draft IEP proposed by Bexley stated that "Bexley Schools will assume costs beyond what parent insurance will cover associated with the Harding School Plus program." (Exh. 6, p.2 (emphasis added).) The Knables' family medical insurance had a lifetime coverage limit for psychiatric care. (Exh. 161.) Requiring the Knables to use their medical insurance would result in a cost to them and would impermissibly deprive Justin of a "free" education.

Bexley argues that the reference to insurance in the draft IEP did not deprive Justin of a free education. Bexley contends that the Knables never told them that their insurance had limits and that they were committed to providing an education to students without parents' expense.

The IHO determined that the Knables had proven by a preponderance of the evidence that "Bexley intended to require the Knables to use their family medical insurance as the primary payor for any covered services provided to Justin by the Harding School." The record bears out this conclusion. (Tr. 507-08.)[10] The Court accordingly affirms the decision of the IHO.

4. Bexley has prevailed in establishing that a residential placement is not required to provide a FAPE to Justin.

Because the Court agrees with the IHO that the proposed IEP was appropriate for Justin, Bexley should not be responsible to reimburse the Knables for their decision to place Justin in a private, residential facility, the Grove School. The facts reveal that the Knables pursued residential placement for Justin for months prior to his actual enrollment at the Grove School. The Knables in fact completed enrollment even as they spoke and met with Bexley, and prior to receiving the proposed IEP. (See, e.g., Tr. 65-68; 838, 902.) The Knables placed Justin at a private residential facility at their own financial risk.

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[10]Q: All right. So the parents had to use whatever insurance they had available to them before Bexley would cover the balance?

A: Yes.

(Tr. 508.)(Testimony of Dr. Hyland).

This is not a question of whether the Court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education and put the child in a private school that offers an otherwise proper education. It can. Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). The Court acknowledges the concerns that arise about a child's educational well-being during the pendency of a due process review and a final judicial decision on the merits. See e.g., School Comm. of Burlington, Mass. v. Department of Educ. of Mass, 47I U.S. 459 (1985). These concerns, however, simply are not implicated here. Unlike those dire situations, here the Knables enrolled Justin in the Grove School prior to being presented with a working draft of an IEP, which the Court has concluded would provide an appropriate education for Justin. They were not in the midst of a due process review. The record reveals that the Knables had made their decision despite any remaining efforts to coordinate a workable IEP or to procedurally grieve their dissatisfaction of it. The Knables therefore are not entitled to have Bexley pay the costs of the private residential program at the Grove School. Wise v. Ohio Dep't of Educ., 80 F.3d 177, 185 (6th Cir. 1996).

IV.

Based on the foregoing, the Court **DENIES** Defendant's Motion for Leave to Submit Additional Evidence (Doc. 61). Plaintiffs' Motion for Judgment on the Pleadings (Doc. 54) is **GRANTED IN PART AND DENTED**; Defendant's Motion for Summary Judgment (Doc. 55) is **GRANTED IN PART AND DENIED IN PART**. The decision of the Impartial Hearing Officer is **AFFIRMED**. The Clerk is directed to remove this matter from the Court's

pending cases and motions list.

IT IS SO ORDERED.

9-30-99 /s/_____
DATE EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

No. 00-1642

IN THE

Supreme Court of the United States

BEXLEY CITY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JUSTIN KNABLE, a minor, by and through his mother and next friend, MARILYN KNABLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a decision issued under the pre-1997 version of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"), awarding parents reimbursement for the cost of educating their disabled son after the school district refused to convene a conference to develop an individualized education program ("IEP") for the child, failed to offer an IEP that addressed the child's unique needs, and failed to offer a program that was free.

2. Whether this Court should revisit its holding in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), that statutory requirements of IDEA applicable to a school district's provision of educational services to eligible children do not apply to placements made by parents following a school district's failure to offer a free appropriate public education.

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OPINIONS BELOW

The opinions of the circuit court and of the district court are attached to Petitioner's Petition at Appendices A and B.

RELEVANT STATUTES AND REGULATIONS

This case requires interpretation of the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1400, *et seq.*, and its implementing regulations, 34 C.F.R. § 300.1, *et seq.*, as they existed prior to their amendment on June 4, 1997 (Public Law 105-17), and March 12, 1999, respectively. Fed. Reg. Vol. 64 No. 48/Friday, March 12, 1999.[1] Because the Petition for Certiorari provides the text of only two statutory provisions and sets forth none of the regulations, additional applicable statutes and regulations are attached to this Brief in Opposition as Appendices A and B.

COUNTERSTATEMENT

A. NATURE OF THE CASE AND PROCEEDINGS BELOW

This case is an appeal from an administrative proceeding brought under the Individuals with Disabilities Education Act ("IDEA," or "Act"), 20 U.S.C. § 1400, *et seq.* Under this law, disabled children such as the Respondent are entitled to receive a "free appropriate public education" ("FAPE") from their local school district that is designed to meet their unique needs. 20 U.S.C. § 1400(c) (R. App. 1a).[2] A FAPE consists of special

1. All citations in this Opposition are to statutes and regulations as they existed prior to their amendment, unless otherwise noted.

2. Respondent's Appendix will be designated as "R. App.__" and Petitioner's Appendix will be designated as "P. App.__." The Petition for Certiorari will be designated as "Pet.__." All other citations will follow the format used by Petitioner. *See* Pet. 3 n.3.

education and related services which, among other requirements, have been provided at public expense and without charge to the parents, and in conformity with an individualized education program required under 20 U.S.C. §§ 1414(a)(5) and 1401(a)(18)(A) and (D). (R. App. 2a, 5a.)

1. Overview of IDEA procedures.

Petitioner's statement of the case ignores many of the essential requirements of IDEA. The following is a summary of well-settled rules.

School districts are required to identify children suspected to be eligible for services under the Act. 20 U.S.C. § 1414(a)(1). Once identified, children must be evaluated to determine whether they qualify for services. *Id.* Following the evaluation, the school district must provide the parents with written notice either of the child's eligibility or lack thereof. 20 U.S.C. § 1415(b)(1)(C) (R. App. 6a, 7a). Once a child is determined eligible, the district must convene a meeting to develop an Individual Education Program ("IEP") for the child. This meeting must be convened pursuant to notice and within timelines set by law, 34 C.F.R. §§ 300.343(c) and 300.345 (R. App. 8a and 10a), and must be conducted according to procedures defined by statute and regulation. 20 U.S.C. §§ 1414(a)(5) and 1415(a)-(b); 34 C.F.R. §§ 300.343-345 and 300.504-505 (R. App. 4a, 5a, 6a, and 8a-16a). Parental participation in the development of an IEP is an essential element of the process. Parents are to be equal participants with the school district in determining the child's needs and how those needs will be addressed. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205, 209 (1982).

The information derived from a child's evaluation, along with input from the IEP team members, determines the child's unique needs and "present levels of performance" contained in

the IEP. [3] Annual goals and objectives are based on the present levels of performance, and the services to be provided are those necessary to achieve the annual goals and short-term objectives. 34 C.F.R. Pt. 300 App. C, comments 36-43 (R. App. 21a to 26a). Once the content of the IEP is appropriately developed, this content, with due consideration of the "least restrictive environment" requirement of the IDEA,[4] determines the choice of placement. The appropriate placement for a child cannot be determined prior to the development of the IEP, until ". . . after decisions have been made about what the child's needs are and what will be provided." 34 C.F.R. Pt. 300 App. C, comment 5 (R. App. 17a).

The IEP developed through the process set forth above is the *modus operandi* of the IDEA and the vehicle through which a school district complies with the requirement of a FAPE for every eligible child residing within its jurisdiction. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 368 (1985). As this Court has noted, "[t]he importance Congress attached to these procedural safeguards cannot be gainsaid. . . ." *Rowley*, 458 U.S. at 205. Serious procedural violations or substantive inadequacy of

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3. "Present level of performance" is a statement contained in the IEP that describes the effect of a child's disability on his performance in academic and non-academic areas, that is written in objectively measurable terms, and that is the foundation of his educational plan. 34 C.F.R. Pt. 300 App. C, comment 36 (R. App. 21a).

4. "Least restrictive environment" refers to the requirement that disabled children be educated with non-disabled students unless to do so would be detrimental to the children involved. 34 C.F.R. §§ 300.550-552.

an eligible child's IEP will constitute a denial of FAPE. *Id.* at 206-207. If a school district fails to provide FAPE, parents may place a child in an appropriate private placement at their own risk and sue the school district for reimbursement. *Burlington*, 471 U.S. at 373.

2. Proceedings below.

The parents in this case placed their behaviorally disabled son in a private, residential school, following the school district's failure, over a nine-month period, to offer a free, appropriate public education to the child, to convene an IEP team meeting despite numerous requests by the parents, to develop an appropriate IEP in accordance with law, or to offer a placement that was at no cost to the parents.

The Sixth Circuit agreed that an IEP team meeting was not held within requisite time limits, or at any time. *Knable v. Bexley City Sch.*, 238 F.3d 755, 765-66 (6th Cir. 2001) (P. App. 14a and 18a). *See* 30 C.F.R. § 300.343(c); 34 C.F.R. Pt. 300 App. C, comments 7, 11, 26, 29 and 35 (R. App. 9a, 17a-19a). The Sixth Circuit also held that the school district's violations denied the child educational opportunity and seriously impaired the parents' right to participate in the IEP process. *Knable*, 238 F.3d at 764 (P. App. 14a-15a). The appeals court evaluated the draft education program proposed by Petitioner and ruled that it was procedurally and substantively inadequate. *Id.* at 764-769 (P. App. 13a-26a). The Sixth Circuit found that the program offered was not free because the draft IEP required the Knables to exhaust their own, limited insurance coverage before Bexley would pay for the psychological "related services" Justin, the child, needed to benefit from his education. *Id.* at 769 (P. App. 26a). The Sixth Circuit concluded that FAPE had not been provided.

Regarding the parents' request for tuition reimbursement, the circuit court noted its "broad discretion" under *Burlington* to fashion equitable relief. *Id.* (P. App. 26a). It found that the parents' placement, Grove School, met the standard of appropriateness this Court enunciated in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11 (1993): "[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.' " *Knable*, 238 F.3d at 770 (citations omitted in original) (P. App. 27a). The Sixth Circuit ordered tuition reimbursement and remanded the case to the district court for determination of the "appropriate and reasonable level of reimbursement that should be required." *Id.* at 771 (quoting *Florence County*, 510 U.S. at 16) (P. App. 30a).

Petitioner moved for a stay of mandate in light of its plan to file a certiorari petition, but the court of appeals denied the motion for stay and returned the mandate on March 1, 2001. Petitioner moved neither for reargument nor for rehearing *en banc*.

B. FACTUAL BACKGROUND

The factual findings of the Sixth Circuit Court of Appeals are the appropriate basis for this Court's consideration of certiorari. This case was a review of a district court opinion, which in turn was a review of an administrative record. Petitioner's factual statement differs significantly from the Sixth Circuit's factual findings, yet Petitioner does not challenge the legal standard of review applied by the circuit court of appeals. By reformulating the facts, Petitioner is, therefore, challenging

the Sixth Circuit's *application* of the standard of review, " a properly stated rule of law" (Supreme Court Rule 10) for which certiorari will not lie.

Respondent disagrees with Petitioner's Statement of Facts and will address its inaccuracies in the context of the reasons for denying the petition.

REASONS FOR DENYING THE PETITION

I.

THE CIRCUITS ARE NOT IN CONFLICT OVER STANDARDS FOR REIMBURSING PARENTS FOR UNILATERAL PLACEMENTS.

The standards for reimbursing unilateral parental placements were established in *Burlington*, and are uniform in all circuits. Tuition reimbursement may be awarded if the school district fails to offer the child a free appropriate public education in a timely manner, and the parents place the child in an appropriate private school.

As this Court noted in *Burlington*, an award of tuition reimbursement is an exercise of the court's equitable jurisdiction under 20 U.S.C. § 1415(e)(2) to "grant such relief as the court determines is appropriate" when resolving disputes arising under IDEA. *Burlington*, 471 U.S. at 374. The Sixth Circuit acknowledged this by stating that "equitable considerations are relevant in fashioning relief under 20 U.S.C. §1415 (e)(2)." *Knable*, 238 F.3d at 771 (P. App. 29a). Courts in all circuits cited by Petitioner,

including the Sixth, consider parental conduct when appropriate in weighing equities and when determining whether and how much tuition reimbursement is due. Such considerations are, however, particular to each case. Petitioner's argument that the circuits disagree over considering parental conduct merely reflects that equitable considerations lead to differing results when the facts of the case are different.

A. The Sixth Circuit correctly determined that the parents had not failed to cooperate.

The Sixth Circuit considered, but did not find evidence of a parental failure to cooperate. Accordingly, the premise of Petitioner's argument — that the Sixth Circuit "completely discounted the parents' actions" (Pet. 14) and that the Sixth Circuit refused "to consider the parents' actions" (Pet. 18) — is incorrect. The Sixth Circuit stated:

> Bexley argues . . . that even if it failed to convene an IEP conference for Justin within the applicable time period, such failure was due to the Knables' lack of cooperation with school officials. Bexley asserts that it was unable to convene a formal IEP conference until the Knables tentatively agreed to a proposed placement for Justin. . . . Bexley thus argues that because the Knables refused to agree with school officials even tentatively about any proposed placements for Justin, the Knables effectively prevented Bexley from convening a formal IEP conference.

> Bexley's argument fails, however. . . . [N]owhere in the regulations is it required that the parents of a disabled child agree with the school district's proposed placement *before* an IEP conference can be held. To the contrary, the regulations expressly provide for the development of an IEP without parental involvement.

Knable, 238 F.3d at 765 (citations omitted, emphasis in original) (P. App. 15a-16a).

The Sixth Circuit's finding that the parents had not failed to cooperate was amply supported in the record. There is no dispute that they readily consented to Bexley's requests to evaluate their child. On November 23, 1993, Justin's sixth grade year, Bexley's evaluation team unanimously agreed that Justin suffered from a "Severe Behavioral Handicap" ("SBH") and was eligible for special education services.[5] (JA 142.) His diagnoses included attention deficit hyperactivity disorder, oppositional behavior, and dysthymia. (JA 121.)

On December 8, 1993, without benefit of an IEP team meeting, Bexley's officials proposed to place Justin at the Hannah Neil Center for Children, a local, SBH treatment program. (JA 142.) The Knables were not enthusiastic about the suggestion of Hannah Neil and asked to see an IEP before making any educational decisions. (JA 144.) Shortly

5. By this time, Justin had been in psychotherapy for several years (JA 120) and had been previously hospitalized in a local psychiatric facility, Upham Hall. (JA 215.) Bexley School staff reported, *inter alia*, that Justin had made threats to kill himself, intimidated others, displayed inappropriate sexual behaviors, and was fascinated with fire. (JA 359, 360.)

thereafter, on December 13, 1993, Justin was admitted to Upham Hall, a psychiatric hospital, for aggressive behaviors at home.[6] (JA 146-147.)

In February 1994, the parents promoted and supported (with Upham Hall's professional services) another attempt at mainstreaming their son back into Bexley's Maryland Elementary School where he had been prior to his hospitalization. (Ex. 105, p. 3; JA 347-348, 410.) There was no IEP, and the springtime attempt at mainstreaming did not work. Justin's behavior deteriorated, and his grades dropped substantially. The Sixth Circuit noted that Justin received F's in writing, spelling and mathematics, D's in reading and social studies and C's in science and health.[7] *Knable*, 238 F.3d 766 at n.4 (P. App. 19a) (JA 242-45).

Throughout and after Justin's sixth grade year, Bexley never convened an IEP meeting even though the Knables consistently asked for IEPs and were available to meet. In addition to the request for an IEP at the December 8, 1993 meeting, they requested an IEP during a meeting on

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6. This was not a "unilateral placement" within the meaning of IDEA, as Bexley claims (Pet. 9), but a hospitalization. The parents did not ask Bexley to pay the cost.

7. Bexley complains (Pet. 15) that the Sixth Circuit failed to give appropriate deference to the hearing officer's finding that Justin made progress in sixth grade, but cites no case for the proposition that a reviewing court must defer to each factual finding a hearing officer makes. Since the Sixth Circuit relied upon this specific evidence of academic and behavioral decline in the record, its rejection of the hearing officer's finding of progress was appropriate. *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1403 (Mar. 26, 2001).

December 14, 1993 (JA 396-397), at a meeting on April 6, 1994 (JA 414-415), at a meeting on June 8, 1994 (Tr. 112, 837), and in a July 18, 1994, letter from Mr. Knable to Bexley's Superintendent Tieman. (JA 229.)

The Knables raised the issue of a residential placement throughout the year, but the Sixth Circuit was correct in ruling that this is not evidence of non-cooperation. To the contrary, IDEA and its implementing regulations contemplate that parents will have opinions as to how their children should be educated and that they will "not lack ardor" in promoting their children's interests. *Rowley*, 458 U.S. at 209. *See also* 34 C.F.R. Pt. 300 App. C, comment 26, ("The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the child's IEP.") (R. App. 18a.) The federal regulations specify that placement decisions cannot be made until the end of the IEP process. 34 C.F.R. Pt. 300 App. C, comment 5 (R. App. 17a.) Moreover, the regulations contain instructions for measures to follow when the school district and the parent cannot reach agreement at an IEP team meeting. 34 C.F.R. Pt. 300 App. C, comment 35 (R. App. 19a.)

The parents did not take concrete steps towards placing their child at the chosen residential school, the Grove School in Connecticut, until after Bexley had failed to convene an IEP meeting despite at least five requests over a nine-month period. They did not act until after the springtime attempt at mainstreaming had failed.[8] Even after Grove accepted Justin

8. There are several typographical errors in the district court's opinion of *Knable v. Bexley City Sch. Dist.*, No. C2-96-1159, slip op. (S.D. Ohio Sept. 30, 1999), Petitioner's Appendix B. (Cont'd)

on August 18, 1994 (JA 169), Mr. Knable again asked for an IEP prior to enrolling his son. (JA 157-158, 444.) Bexley advised that it was considering the Harding Hospital School and suggested Mr. Knable visit. (JA 158.) He did so on August 22, 1994, and was concerned about Harding's short school day, and about the requirement that he pay $80 per day in therapy costs. (JA 158, 159.) He expressed these concerns to Anne Hyland, Bexley's director of special education, and again asked for an IEP. He also asked if Bexley would pay the cost of a residential placement. (JA 161.)

On September 12, 1994, after the Knables had received the draft IEP which the Sixth Circuit subsequently determined to be substantively inadequate, they accepted Grove's offer of admission by sending a check to guarantee Justin's place in the seventh grade class. (Tr. 893.) The Knables brought Justin to the Grove School on September 12 or 15, 1994. (Tr. 984.) On September 20, 1994, the Knables' attorney wrote to Bexley and requested an IEP meeting. (JA 170, 472; Ex. 130.) A series of settlement meetings, whose content is confidential, ensued. (Tr. 976.) After the meetings failed to produce agreement, the Knables filed for due process in January 1995. Petitioner's assertion (Pet. 10) that the Knables never responded to the draft IEP and did not inform school officials of their decision to send Justin to Grove School prior to due process is incorrect.

(Cont'd)

A significant error occurs on P. App. 40a. The sentence that begins, "On or about August 16 and 17, 1993, Mrs. Knable completed enrollment and student information forms for Grove School, . . ." has an incorrect date. The year was 1994 (JA 427-431.) Another error occurs on P. App. 41a. The sentence that reads, "At the beginning of the 1994-94 school year, Bexley still had not convened an IEP team meeting," should refer to the 1994-95 school year. The Sixth Circuit statement of facts is correct.

The record simply does not support Bexley's assertion that the parents failed to cooperate in the IEP process. To the contrary, the record shows that they tried to make the IDEA process work before taking matters into their own hands.

B. The circuits consistently consider parental conduct in fashioning equitable relief under the Act.

In accordance with *Burlington* and with the circuit court cases cited by Petitioner (Pet. 12-14), the Sixth Circuit will, when the facts so warrant, deny tuition reimbursement. In *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998), a case in which the parents removed their disabled child and placed him in an out-of-state school without first giving the school district the opportunity to develop an IEP for him, the Sixth Circuit denied reimbursement for the year in question, even though FAPE had not been offered. Similarly, in *Wise v. Ohio Dep't. of Educ.*, 80 F.3d 177 (6th Cir. 1996), the Sixth Circuit denied reimbursement to parents who had placed their children in an out-of-state residential school without first seeking an appropriate IEP from their local school district. The Sixth Circuit reached a different result in *Knable* than in *Tucker* and in *Wise* because the facts were different. The Knables gave Petitioner ample opportunity to convene an IEP team meeting and develop an IEP, and actively sought to participate in that process.

The cases from other circuits cited by Petitioner (Pet. 14) are all factually distinguishable from the case at bar. In *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462, 469 (7th Cir. 2000), FAPE could not be provided because the parent did not make the child available for an

evaluation. Accordingly, the parents were denied reimbursement for their unilateral placement. The Knables, in contrast, readily agreed to an evaluation of Justin, and it was conducted without obstruction.

In *Schoenfield v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998), FAPE could not be provided because the parents withdrew their child from the public school after one day of attendance without even requesting an IEP team meeting or giving the school time to develop an IEP. Accordingly, the parents were denied reimbursement for their unilateral placement. The Knables, in contrast, repeatedly asked for an IEP and waited nine months for an IEP team meeting that never was convened before placing their child at Grove school. Their child attended school in the district for most of this period. Bexley had ample opportunity to follow the correct procedures but failed to do so.

In *Cain v. Yukon Pub. Sch. Dist. I-27*, 775 F.2d 15, 16 (10th Cir. 1985), the school and the parents agreed that a change in the child's IEP was necessary. They discussed residential placements without making a final decision, and the child's teacher planned a series of tests for the student which would "help the school develop an appropriate program." *Id.* at 17. At this point, the parents withdrew from the IEP process. They did not make the child available for the testing, and led the district to believe that they were placing him in a residential school. Contacts in April and May confirmed this impression. Thus, when the parents appeared at the district the following August 25 to enroll the child, the school was caught off-guard because it hadn't expected the child to be enrolled. It was in this context — failure to make their child available for testing and withdrawal from the IEP process — that the court found the

parents had contributed to the failure to provide FAPE. *Cain* is factually distinguishable from the case at bar because the Knables made their child available for requested testing. Contrary to the parents in *Cain*, the Knables did not withdraw from the IEP process but tried unsuccessfully to make it work.

Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991), also cited by Petitioner, is not on point. The court found that the IEP had provided FAPE to the child, so the parents would not have been entitled to reimbursement under any circumstances. *Id.* at 1000. *Ash v. Lake Oswego Sch. Dist. No. 7J*, 980 F.2d 585 (9th Cir. 1992), is similarly inapposite because the court did award reimbursement to the parents for a unilateral placement on the basis that the school district had not offered FAPE. *Id.* at 589.

The consistency of legal principle between the Sixth Circuit and other circuits serves to underscore that Bexley's Petition is not about the law, but is a reflection of its dissatisfaction with the outcome of the Sixth Circuit's balancing of the fact-specific equities in this case. Absent a true conflict among the circuits, this Court should not grant certiorari.

II.

PETITIONER'S CHALLENGE WILL NOT CHANGE THE CASE'S OUTCOME BECAUSE BEXLEY DOES NOT SEEK REVIEW OF THE SUBSTANTIVE INADEQUACY OF ITS DRAFT IEP

The Petition filed by Bexley never challenges the Sixth Circuit's conclusions that the proposed IEP was inadequate as drafted and that the draft IEP failed to offer a program which was free. Bexley's failure to pose this challenge means that even if Bexley's procedural violations were excusable, the outcome of the case would not change. Certiorari is not appropriate under these circumstances.

In *Rowley*, 458 U.S. at 206-207, this Court developed a two-pronged test for determining the adequacy of an IEP. A reviewing tribunal must first determine whether the school district complied with the Act's procedures, and second, whether the IEP developed through these procedures is substantively adequate. Substantive inadequacies, alone, constitute denial of a FAPE even if there are no procedural defects.

The Sixth Circuit found that Petitioners failed both the procedural and substantive prongs of the *Rowley* test. *Knable*, 238 F.3d at 767 (P. App. 20a, 21a.) Mandatory procedures were not followed, *and* the draft IEP failed to provide a FAPE to Justin. *Id.* at 768-69 (P. App. 20a through 25a.) The IEP generally failed to meet the requirements of 20 U.S.C. § 1401(a)(20) (R. App. A. 3a, 4a), in that it did not include appropriate information about the child's present levels of performance, goals and objectives to be achieved, and the special education and related services to be offered. *See* 34 C.F.R. Pt. 300 App. C, comments 36-43 (Res. App.

21a-26a.) The IEP also failed to describe the evaluations, procedures, tests, records, or reports that Bexley used as the basis for its proposal, as required by 34 C.F.R. § 300.505. *Id.* (R. App. 24a.) Thus, the court could not conclude that the draft IEP was reasonably calculated to provide educational benefit to the child.

The placement offered, moreover, was not free, in violation of 20 U.S.C. § 1401(a)(18) and 20 U.S.C. § 1401(a)(16), (R. App. 1a-2a), which guarantee that special education are to be provided *at no cost to the parents.* The court of appeals, the district court, and the administrative hearing officer all agreed that Petitioner did not offer a "free" education to Justin because the draft IEP required the Knables to pay for "related services" — those services necessary to enable Justin to benefit from his education (20 U.S.C. § 1401(a)(17)) (R. App. 2a) — by exhausting their health insurance to cover the therapeutic costs associated with the program. *Knable*, 238 F.3d at 761, (P. App. 25a).

The Sixth Circuit rejected Bexley's invitation to look outside the four corners of the draft IEP and speculate as to what Bexley could have offered. In doing so, the appeals court relied on 20 U.S.C. § 1415(b)(1)(C) (R. App. 6a-7a), which requires school districts to provide parents with "a formal written offer before either initiating a placement for a disabled child or otherwise providing a FAPE to the child." *Knable*, 283 F. 3d at 768 (P. App. 22a). Citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994), the Sixth Circuit noted that the "formal written offer" requirement is "not merely technical, but rather serves the important purpose of creating a clear record of the educational placement and other services offered to the parents." *Id.* The only services that are actually committed to the child are

those listed in this written offer. 34 C.F.R. Pt. 300, App. C, comment 45 (R. App. 26a).[9]

Petitioner has asserted no basis for reviewing the Sixth Circuit's ruling that its consideration of the substantive appropriateness of the IEP could be based solely on the document itself. Petitioner presents no conflict among the circuits on this issue or the on the issue of a *free* placement. Thus, the Sixth Circuit's conclusion that a substantively appropriate IEP was not offered is final, and further review of the circuit court's other reasons for finding a denial of FAPE would not be a judicious use of the Supreme Court's resources.

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9. The Sixth Circuit was correct in finding that the parents did not have a meaningful role in formulating the IEP because there never was an IEP meeting or an IEP. Bexley's argument to the contrary (Pet. 15) is erroneous. The district court's suggestion that there was an IEP was a mixed question of law and fact which was properly reviewed *de novo*. *Tucker v. Calloway County Board of Educ.*, 136 F.3d 495, 503 (6th Cir. 1998).

III.

THE CIRCUITS ARE NOT SPLIT ON WHETHER A LEAST RESTRICTIVE ENVIRONMENT REQUIREMENT APPLIES TO PARENTAL PLACEMENTS

A. The decisions regarding the application of the LRE requirement of the IDEA are consistent among the circuits and in accordance with this Court's decisions in *Burlington* and *Florence County.*

Petitioner has not identified any ruling by a court of appeals holding that the requirement of education in the least restrictive environment ("LRE")[10] is a bar to reimbursement when a school has failed to provide FAPE and parents have made a unilateral placement that is otherwise appropriate. Bexley's assertion of a conflict among the circuits on this issue (Pet. 23-26) is merely identifying a difference in the application of a properly stated rule of law that is not a basis for certiorari.

1. There is no conflict with the Second Circuit.

In *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1403 (Mar. 26, 2001), the Second Circuit did not, as Petitioner asserts, apply the LRE requirements of 20 U.S.C. § 1412(5)(B) as an absolute bar to reimbursement for unilateral placements. To the contrary, the Second Circuit stated, "we recognize that parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board," and cited the Sixth Circuit's opinion in *Cleveland Heights-*

10. 20 U.S.C. § 1412(5)(B).

University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir. 1998). There is no conflicting legal principle here; the Second Circuit followed the Sixth Circuit rule.

Reference to other Second Circuit decisions further clarifies the consistency between the circuits. In *Muller v. Committee on Special Educ.*, 145 F.3d 95 (2d Cir. 1998), the Second Circuit awarded tuition reimbursement for a private school notwithstanding the school district's argument that the private school was not the least restrictive environment because

> the District failed to provide . . . [the child] with an appropriate IEP under the IDEA that would allow her to continue her public school education, and, thus, the Mullers had no alternative but to unilaterally place her in a private facility.

Id. at 105. Similarly, In *Briggs v. Bd. of Educ.*, 888 F.2d 686, 692 (2d Cir. 1989), the Second Circuit approved a segregated placement, stating "we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students."

Both circuits recognize that the exercise of equitable authority frequently defies rigid rules. In this regard, the *M.S.* court stated that LRE "may be considered by the hearing officer in determining whether the placement was appropriate," *M.S.*, 231 F.3d at 105. Similarly, the *Knable* panel concluded that a court should not assume that placements in private schools for disabled children *automatically* violate IDEA's LRE requirement. *Knable*, 238

F.3d at 770, (P. App. 28a.) Both circuits allow for the exercise of discretion in designing remedies under 20 U.S.C. § 1415(e)(2) to meet the unique needs of a child. Neither circuit makes the LRE rule an absolute bar to reimbursement for an otherwise appropriate unilateral placement.

Bexley's ignores the significant factual differences in asserting (Pet. 24) that the Sixth Circuit would have denied tuition reimbursement to the Knables if it had applied the Second Circuit rule. In *M.S.*, the child did not make progress in the private placement. *M.S.*, 231 F.3d at 104. His reading level did not improve and his spelling level declined. By contrast, in *Knable*, the Sixth Circuit found:

> Justin made significant educational progress during his two years at Grove School. The record indicates that the frequency of Justin's inappropriate behavior significantly decreased during his first year at Grove and his grades improved dramatically.

Knable, 238 F.3d at 770, (P. App. 27a-28a). The result in the two cases differed only because the facts differed.

2. There is no conflict with the Seventh Circuit.

Without explaining how the Seventh Circuit's tuition reimbursement standards conflict with the Sixth Circuit's approach, Petitioner cites *Bd. of Educ. of Murphysboro v. Illinois State Bd. of Educ.*, 41 F.3d 1162 (7th Cir. 1994). Like the Second Circuit's decisions in *M.S.*, *Muller*, and *Briggs*, *Murphysboro* is consistent with *Knable*. The Seventh Circuit found that parents were entitled to reimbursement for the unilateral placement of their son because the school

had failed to offer FAPE. *Murphysboro* 431 F.3d at 1169. In arriving at its decision, the *Murphysboro* court also rejected the LRE argument propounded by the school district:

> The mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally impaired children and their non-disabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums.

Id. at 1168. Under either the Seventh or the Sixth Circuit rule, the LRE requirements in 20 U.S.C. § 1412(5)(B) is not applicable to parental placements.

Petitioners are incorrect in asserting that Bexley's proposal of Harding Hospital School distinguishes *Murphysboro* from *Knable*. In neither case did the school offer the child an adequate program. In *Knable*, the program offered was not even free. *Knable*, 238 F.3d at 767-69, (P. App. 25a-26a).

3. The Supreme Court has already established rules for reimbursing parental placements.

In ruling that IDEA's LRE provision is not directly applicable to unilateral parental placements, the circuits have followed two prior decisions of this Court holding that IDEA provisions governing school districts do not apply to parents. In *Burlington*, this Court held that IDEA's provision requiring school districts to maintain a child's current educational placement ("stay-put") pending due process

review, 20 U.S.C. § 1415(e)(3), is inapplicable to parents who make an appropriate unilateral placement following denial of FAPE. *Burlington*, 471 U.S. at 374. In *Florence County*, this Court held that a parent can be reimbursed even if the unilateral placement does not meet other statutory requirements in 20 U.S.C. § 1401(a)(18) pertaining to provision of FAPE. 510 U.S. at 13-14. The analytical framework has been clearly established; there is no need to revisit this framework as applied to the issue of LRE.

B. The case at bar presents no compelling LRE question.

The record in this case is not a proper vehicle to review the applicability of LRE to unilateral placements. Harding Hospital School proposed by Bexley was, in the words of the school's director, Jan Yore, a "very restrictive" placement. (Tr. 1039.) Had Justin attended Harding, he would have been in a separate class in a segregated facility on the grounds of a psychiatric hospital. (Ex. 6.)

The real dispute was over whether a residential placement was necessary to allow Justin to benefit from his education. In this regard, the appeals court had before it substantial, credible, professional evidence that Justin required a residential placement. (JA 172-173.) Dr. Kathleen Quinn, a board-certified child, adolescent, adult, and forensic psychiatrist (Tr. 292, 296; Ex. 114) on the staff of the Cleveland Clinic Foundation, who evaluated Justin and the Grove School, and who visited Harding Hospital School, testified that a residential placement was necessary for Justin to benefit from his education. He required a 24-hour program that would provide a consistency of response to contain him behaviorally and emotionally. (JA 172.) She noted that he had been out of control and failing educationally for at least

one calendar year, and that outpatient intervention had not stopped the process. (JA 173.) Dr. Quinn did not testify that Justin would have benefitted from Harding Hospital School as Bexley asserts. (Pet. 12.) To the contrary, her statement was that Harding did not have the necessary ingredients to allow Justin to progress in the classroom education sense. (Tr. 413-414).[11]

The Sixth Circuit's exercise of its discretion to award the parents tuition reimbursement was appropriate and does not require further review.

IV.

THIS CASE LACKS FAR-REACHING IMPLICATIONS BECAUSE IDEA WAS AMENDED AFTER THE ADMINISTRATIVE HEARING

Review by this Court is generally reserved for cases with significant implications. This case presents no such implications because IDEA and its implementing regulations were prospectively amended in 1997, approximately two years after the Knables' due process hearing. Contrary to Bexley's assertion (Pet. 2 n.2), the amendments to IDEA do change the substance of the statutes governing the tuition reimbursement issue. IDEA now explicitly provides, at 20 U.S.C. § 1412(a)(10)(C)(ii) (1997), that reimbursement

11. Harding Hospital School lacked the consistency that Justin needed for an additional reason. Harding School experienced financial difficulties during the 1994-95 school year (Tr. 347, 348), and had closed by the end of the school year. (JA 186.) Harding Hospital School had ceased to exist by the time of the hearing on this matter. (JA 186.) According to Harding's director, Jan Yore, closure caused severe problems for the children in the program. (JA 207.)

for a private school placement is available "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment."

Subject to certain exceptions contained in 20 U.S.C. § 1412(a)(10)(C)(iv) (1997), the new statute provides guidance as to those situations where reimbursement may be denied or reduced; *e.g.* when appropriately informed parents fail to give designated notice of the intent to unilaterally place, when they fail to make their child available for an evaluation, or "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. §§ 1412(a)(10)(C)(iii)(I)(aa) and (bb); (C)(iii)(II); and (C)(iii)(III)(1997).[12] The newly amended statute continues IDEA's rule that school districts must educate children in the least restrictive environment [20 U.S.C. § 1412(a)(5)(A) (1997)], but the new law does not extend the rule to bar reimbursement for placements made by parents when the school district fails to provide FAPE.

The Sixth Circuit considered whether the new IDEA provisions were applicable in this case, and ruled that they were not because they do not have retroactive effect. *See Knable*, 238 F.3d at 762 n.2, *citing Tucker*, 136 F.3d at 500-01, (P. App. 9a n.2). Petitioner has not argued otherwise. Thus, were there to be further review, it would be without reference to current, statutory law and would have limited application.

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12. The Department of Education promulgated regulations under the statute on Friday, March 12, 1999. Fed. Reg. Vo. 64, No. 48, p. 12406. *See* 34 C.F.R. § 300.403 (1999).

The statutory clarifications address any argument Petitioner might have had that the Supreme Court should accept certiorari and provide guidance to the circuits. Congress has spoken and additional guidance by this Court should await conflicts, if any, among circuit courts interpreting the new statutory provisions.

V.

THIS CASE DOES NOT RAISE NOVEL ISSUES ON COSTS OF SPECIAL EDUCATION

The issue of excessive cost is not presented by this record. Although Grove School did cost $51,300 for a twelve month program (or $38, 475 for nine months), Bexley fails to consider that the program it proposed was also quite expensive. The cost of Harding Hospital School was $80 per day for the educational program, plus $80 per day for the therapeutic program. (JA 203; Tr. 1036), *Knable*, 238 F. 3d at 761, (P. App. 6a). For 180 days of school, a nine-month program, Harding would have cost $28,800.[13] This does not include the cost of psychiatric hospitalization, which was an integral part of Harding's behavioral program. (Tr. 1031, 1032.) Though Bexley wanted to contain its costs by shifting the payment for therapeutic services to the Knables' insurance, this would have reduced insurance benefits otherwise available to Justin and the Knable family. The tribunals below were unanimous that this

13. A nine month figure is used for comparison purposes only. In fact, Grove was a year-round program, and, as Bexley's expert conceded, to receive a FAPE, Justin needed a year-round program even had he attended Harding. (Tr. 711-712.) Since Bexley's proposed IEP did not specify what "extended school year services" ("ESY") it was going to provide, Respondent is unable to make a twelve-month comparison.

was a denial of a "free" program as the IDEA requires, and that all costs of the program had to be borne by Bexley.

This Court has not found cost issues to be dispositive, even where substantial costs are involved:

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Florence County, 510 U.S. at 15; *see also Garret F. v. Cedar Rapids Comm. Sch. Dist.*, 526 U.S. 66, 77 (1999) ("The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law.")

In remanding the case to the district court, the *Knable* court specifically addressed Bexley's continuing complaint about costs and directed the lower court to follow this Court's guidance from *Florence County*, namely to "consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Knable*, 238 F.3d at 771 (citations omitted) (P. App. 30a.) The matter is not ripe for review on the issue of costs.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX A
EXCERPTS FROM 20 U.S.C. CHAPTER 33 (PRIOR TO 1997 AMENDMENTS)

SUBCHAPTER I — GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

* * *

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

* * *

§ 1401. Definitions

(a) As used in this chapter —

* * *

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including —

Appendix A

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that —

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

Appendix A

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include —

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

Appendix A

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the inter-agency responsibilities[1] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

* * *

§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational

1. So in original. Probably should be "responsibilities".

unit which desires to receive payments under Sec. 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall —

* * *

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in Sec. 1477(d) for each child with a disability aged 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise its provisions periodically, but not less than annually;

* * *

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through

subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to —

(A) an opportunity for the parents of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency

or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

* * * *

APPENDIX B
EXCERPTS FROM 34 C.F.R., PART 300 AND APPENDIX C TO PART 300 – NOTICE OF INTERPRETATION (PRIOR TO MARCH, 1999 AMENDMENTS)

§ 300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must —

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343;

* * *

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

(b) [Reserved]

(c) *Timeline.* A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

* * *

§ 300.344 Participants in meetings.

(a) *General.* The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a child with a disability who has been evaluated for the first time, the public agency shall ensure —

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

* * *

§ 300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including —

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance;

(2) If a purpose of the meeting is the consideration of transition services for a student, the notice must also —

(i) Indicate this purpose;

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as —

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

* * *

§ 300.346 Content of individualized education program.

(a) *General.* The IEP for each child must include —

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) *Transition services.* (1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in § 300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.18(b)(2)(i) through (b)(2)(iii), the IEP must include a statement to that effect and the basis upon which the determination was made.

* * *

§ 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice that meets the requirements of § 300.505 must be given to the parents of a child with a disability a reasonable time before the public agency —

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

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(b) *Consent; procedures if a parent refuses consent.* (1) Parental consent must be obtained before —

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a child with a disability in a program providing special education and related services.

(2) If State law requires parental consent before a child with a disability is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(3) If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 300.510-300.513.

(c) *Additional State consent requirements.* In addition to the parental consent requirements described in paragraph (b) of this section, a State may require parental consent for

other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(d) *Limitation.* A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraphs (b) or (c) of this section.

* * *

§ 300.505 Content of notice.

(a) The notice under § 300.504 must include —

(1) A full explanation of all of the procedural safeguards available to the parents under § 300.500, §§ 300.502-300.515, and §§ 300.562-300.569;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors that are relevant to the agency's proposal or refusal.

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(b) The notice must be —

(1) Written in language understandable to the general public; and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure —

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice; and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

* * *

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APPENDIX C TO PART 300 (EXCERPTS)

5. For a child with a disability receiving special education for the first time, when must an IEP be developed — before placement or after placement?

An IEP must be in effect before special education and related services are provided to a child. (§ 300.342(b)(1), emphasis added.) The appropriate placement for a given child with a disability cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.

* * *

7. What is the purpose of the 30 day timeline in § 300.343(c)?

The 30 day timeline in § 300.343(c) ensures that there will not be a significant delay between the time a child is evaluated and when the child begins to receive special education. Once it is determined — through the evaluation — that a child has a disability, the public agency has up to 30 days to hold an IEP meeting.

* * *

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11. Who can initiate IEP meetings?

IEP meetings are initiated and conducted at the discretion of the public agency. However, if the parents of a child with a disability believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting. The public agency should grant any reasonable request for such a meeting.

* * *

26. What is the role of the parents at an IEP meeting?

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.

* * *

29. Are parents required to sign IEPs?

Parent signatures are not required by either the Act or regulations. However, having such signatures is considered by parents, advocates, and public agency personnel to be useful.

* * *

b. An IEP signed by the parents is one way to indicate that the parents approved the child's special education program.

* * *

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35. If the parents and agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached?

As a general rule, the agency and parents would agree to an interim course of action for serving the child (i.e., in terms of placement and/or services) to be followed until the area of disagreement over the IEP is resolved. The manner in which this interim measure is developed and agreed to by both parties is left to the discretion of the individual State or local agency. However, if the parents and agency cannot agree on an interim measure, the child's last agreed upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved. The following may be helpful to agencies if there are disagreements:

a. There may be instances where the parents and agency are in agreement about the basic IEP services (e.g., the child's placement and/or the special education services), but disagree about the provision of a particular related service (i.e., whether the service is needed and/or the amount to be provided). In such cases, it is recommended (1) that the IEP be implemented in all areas where there is agreement, (2) that the document indicate the points of disagreement, and (3) that procedures be initiated to resolve the disagreement.

b. Sometimes the disagreement is with the placement or kind of special education to be provided (e.g., one party proposes a self-contained placement, and the other proposes resource room services). In such cases, the agency might, for example, carry out any one or all of the following steps:

(1) Remind the parents that they may resolve their differences through the due process procedures under part B; (2) work with the parents to develop an interim course of action (in terms of placement and/or services) that both parties can agree to until resolution is reached; and (3) recommend the use of mediation, or some other informal procedure for resolving the differences without going to a due process hearing. (See Question 32, above, regarding the right to appeal.)

c. If, because of the disagreement over the IEP, a hearing is initiated by either the parents or agency, the agency may not change the child's placement unless the parents and agency agree otherwise. (See § 300.513, Child's status during proceedings.) The following two examples are related to this requirement:

(1) A child in the regular fourth grade has been evaluated and found to be eligible for special education. The agency and parents agree that the child has a specific learning disability. However, one party proposes placement in a self-contained program, and the other proposes placement in a resource room. Agreement cannot be reached, and a due process hearing is initiated. Unless the parents and agency agree otherwise, the child would remain in the regular fourth grade until the issue is resolved.

On the other hand, since the child's need for special education is not in question, both parties might agree — as an interim measure — (1) to temporarily place the child in either one of the programs proposed at the meeting (self-contained program or resource room), or (2) to serve the child through some other temporary arrangement.

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(2) A child with a disability is currently receiving special education under an existing IEP. A due process hearing has been initiated regarding an alternative special education placement for the child. Unless the parents and agency agree otherwise, the child would remain in the current placement. In this situation, the child's IEP could be revised, as necessary, and implemented in all of the areas agreed to by the parents and agency, while the area of disagreement (i.e., the child's placement) is being settled through due process.

* * *

36. What should be included in the statement of the child's present levels of educational performance?

The statement of present levels of educational performance will be different for each child with a disability. Thus, determinations about the content of the statement for an individual child are matters that are left to the discretion of participants in the IEP meetings. However, the following are some points that should be taken into account in writing this part of the IEP:

a. The statement should accurately describe the effect of the child's disability on the child's performance in any area of education that is affected, including (1) academic areas (reading, math, communication, etc.), and (2) non-academic areas (daily life activities, mobility, etc.).

* * *

b. The statement should be written in objective measurable terms, to the extent possible. Data from the child's evaluation would be a good source of such information. Test scores that are pertinent to the child's diagnosis might be included, if appropriate. However, the scores should be (1) self-explanatory (i.e., they can be interpreted by all participants without the use of test manuals or other aids), or (2) an explanation should be included. Whatever test results are used should reflect the impact of the disability on the child's performance. Thus, raw scores would not usually be sufficient.

c. There should be a direct relationship between the present levels of educational performance and the other components of the IEP. Thus, if the statement describes a problem with the child's reading level and points to a deficiency in a specific reading skill, this problem should be addressed under both (1) goals and objectives, and (2) specific special education and related services to be provided to the child.

37. Why are goals and objectives required in the IEP?

The statutory requirements for including annual goals and short term instructional objectives (section 602(a)(20)(B)), and for having at least an annual review of the IEP of a child with a disability (section 614(a)(5)) provide a mechanism for determining (1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs. In effect, these

requirements provide a way for the child's teacher(s) and parents to be able to track the child's progress in special education. However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in daily, weekly, or monthly instructional plans.

38. What are annual goals in an IEP?

The annual goals in the IEP are statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period in the child's special education program. As indicated under Question 36, above, there should be a direct relationship between the annual goals and the present levels of educational performance.

39. What are short term instructional objectives in an IEP?

Short term instructional objectives (also called IEP objectives) are measurable, intermediate steps between the present levels of educational performance of a child with a disability and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

In some respects, IEP objectives are similar to objectives used in daily classroom instructional plans. For example, both kinds of objectives are used (1) to describe what a given

child is expected to accomplish in a particular area within some specified time period, and (2) to determine the extent that the child is progressing toward those accomplishments.

In other respects, objectives in IEPs are different from those used in instructional plans, primarily in the amount of detail they provide. IEP objectives provide general benchmarks for determining progress toward meeting the annual goals. These objectives should be projected to be accomplished over an extended period of time (e.g., an entire school quarter or semester). On the other hand, the objectives in classroom instructional plans deal with more specific outcomes that are to be accomplished on a daily, weekly, or monthly basis. Classroom instructional plans generally include details not required in an IEP, such as the specific methods, activities, and materials (e.g., use of flash cards) that will be used in accomplishing the objectives.

40. Should the IEP goals and objectives focus only on special education and related services, or should they relate to the total education of the child?

IEP goals and objectives are concerned primarily with meeting the needs of a child with a disability for special education and related services, and are not required to cover other areas of the child's education. Stated another way, the goals and objectives in the IEP should focus on offsetting or reducing the problems resulting from the child's disability that interfere with learning and educational performance in school. For example, if a child with a learning disability is functioning several grades below the child's indicated ability in reading and has a specific problem with word recognition,

the IEP goals and objectives would be directed toward (1) closing the gap between the child's indicated ability and current level of functioning, and (2) helping the child increase the ability to use word attack skills effectively (or to find some other approach to increase independence in reading).

For a child with a mild speech impairment, the IEP objectives would focus on improving the child's communication skills, by either (1) correcting the impairment, or (2) minimizing its effect on the child's ability to communicate. On the other hand, the goals and objectives for a child with severe mental retardation would be more comprehensive and cover more of the child's school program than if the child has only a mild disability.

41. Should there be a relationship between the goals and objectives in the IEP and those that are in instructional plans of special education personnel?

Yes. There should be a direct relationship between the IEP goals and objectives for a given child with a disability and the goals and objectives that are in the special education instructional plans for the child. However, the IEP is not intended to be detailed enough to be used as an instructional plan. The IEP, through its goals and objectives, (1) sets the general direction to be taken by those who will implement the IEP, and (2) serves as the basis for developing a detailed instructional plan for the child.

* * *

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42. When must IEP objectives be written — before placement or after placement?

IEP objectives must be written before placement. Once a child with a disability is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

43. Can short term instructional objectives be changed without initiating another IEP meeting?

No. Section 300.343(a) provides that the agency "is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and *revising* the IEP of a child with a disability" (emphasis added). Since a change in short term instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see § 300.504(a)(1)), and (2) initiate an IEP meeting. Note, however, that if the parents are unable or unwilling to attend such a meeting, their participation in the revision of the IEP objectives can be obtained through other means, including individual or conference telephone calls (see § 300.345(c)).

* * *

45. Is the IEP a commitment to provide services — i.e., must a public agency provide all of the services listed in the IEP?

Yes. The IEP of each child with a disability must include all services necessary to meet the child's identified special

education and related services needs; and all services in the IEP must be provided in order for the agency to be in compliance with the Act.

* * *

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child. Section 602(a)(20) of the Act defines the IEP as a written statement developed in any meeting with the agency representative, the teacher, the parent, and, if appropriate, the child.

It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Public Law 94-142 makes it clear that parents must be given the opportunity to be active participants in all major decisions affecting the education of their children with disabilities. (See, e.g., S. Rep. No. 168, 94th Cong. 1st Sess. 13 (1975); S. Rep. No. 455 (Conference Report), 94th Cong. 1st Sess. 47-50 (1975).)

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Supreme Court, U.S.
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No. 00-1642

In the
Supreme Court of the United States

BEXLEY CITY SCHOOL DISTRICT, et al.,
Petitioners,

v.

JUSTIN KNABLE, a minor by and through his mother and next friend, Marilyn Knable,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. QUESTIONS PRESENTED

Respondents have incorrectly restated and mischaracterized Petitioners' questions presented in contravention to SUP. CT. R. 15. See Brief in Opposition, p. i. The rule provides that a brief in opposition may raise an objection to consideration of a question presented based on what occurred in the proceedings below; it does not provide a vehicle for Respondents to present their own questions to the Court.

Respondents' argument lacks merit that Petitioners' challenge will not change the case's outcome because it does not seek review of the decision about the draft IEP. Cf. Brief in Opposition, pp. 15-17. Petitioners are fully aware that this Court does not sit as a court of error, but instead grants certiorari as a matter of judicial discretion based only upon compelling reasons. See SUP. CT. R. 10. Accordingly, the petition for writ of certiorari identifies important questions to the administration of the Individuals with Disabilities Education Act (IDEA) for this Court's review rather than specific assignments of error regarding the Sixth Circuit's erroneous factual findings and misapplications of the law. Cf. Brief in Opposition, p. 17. If certiorari is granted, the Court may consider such factual and legal errors as are fairly encompassed by the questions set forth in the petition. See SUP. CT. R. 14.1(a). Given that the first question presented specifically referred to the incompleteness of the IEP, that issue would be an appropriate subsidiary question.[1]

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[1]In the petition for writ of certiorari, Petitioners set forth the statement of facts and course of proceedings below as required by SUP. CT. R. 14 to the extent necessary to provide context for this Court's review of the issues raised in the questions presented. Contrary to Respondents' assertion, Petitioners did not attempt in the petition, and do not attempt now, to provide an exhaustive

II. REASONS FOR GRANTING PETITION

A. This Court Needs To Provide Guidance To Lower Courts About The Obligations Of Public Schools And Parents In Tuition Reimbursement Cases.

This Court has held that parents are entitled to tuition reimbursement if a court finds (1) the school district failed to provide a free appropriate public education (FAPE), and (2) the parents' private placement is appropriate under the Act. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993). This holding was incorporated into the 1997 amendments to the IDEA, 20 U.S.C. § 1400 et seq., and its implementing regulations. Specifically, 34 C.F.R. § 300.403(c) (1999) parallels Carter by providing that parents are entitled to tuition reimbursement for a unilateral enrollment if the court or hearing officer finds that the school district "had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." Because of the parallel, this case would have proceeded in the same manner had it been brought after the 1997 amendments were in effect.

Petitioners' first question presented asks this Court whether parents' actions are a relevant factor in determining whether a school district has provided FAPE under the first prong of the Carter test. Neither Carter nor the amended statute and regulations addresses the issue of when parents' actions are relevant under the first prong of the Carter test. This is a threshold question of a school district's liability for tuition reimbursement. It is separate and apart from the

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statement of facts or assignments of error by the court below.

question of remedy that is asked only after the parents have satisfied the two-pronged Carter test. Respondents have blurred the two concepts together and have focused their argument on remedy rather than liability. See Brief in Opposition, p. 12 (referring in argument heading to "fashioning equitable relief") and p. 24 (referring to 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (1997) regarding tuition reimbursement being reduced or denied).

Other circuits have held, in the context of determining liability not remedy, that parents' actions are a relevant factor in determining whether or not a school district has provided FAPE under the first prong of the Carter test. See, e.g., Roland M. v. Concord Sch. Comm., 910 F.2d 983,995 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991); Patricia P. v. Bd. of Educ. of Oak Park, 203 F.3d 462, 468 (7th Cir. 2000); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379, 382 (8th Cir. 1998); Ash v. Lake Oswego Sch. Dist. No. 7J, 980 F.2d 585, 589 (9th Cir. 1992); Cain v. Yukon Pub. Sch. Dist. 1-27, 775 F.3d 15, 20 (10th Cir. 1985). The Sixth Circuit's decision in Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2000), which completely discounted the parents' actions that resulted in missed timelines and entirely ignored their actions that resulted in an incomplete IEP in its consideration of whether or not the school district provided FAPE, is in conflict with these decisions.

The Sixth Circuit never addressed the specific findings of the impartial hearing officer (IHO) and district court that the Knables contributed to the draft nature of the IEP because of their "steadfast insistence upon a residential placement." (JA 547) The Sixth Circuit also ignored Mr. Knable's fax to his attorney, sent before he received the draft IEP, asking, "How should I proceed with Bexley as far as informing them of our decision" and indicating, "I am also pursuing experts

who would testify." (Ex. 122, p. 3)

As the First Circuit recognized, the law ought not to abet parties who do not cooperate in the IEP process and then attempt to jettison the IEP because of problems created by their own obstructionism. See Roland M., 910 F.2d at 995. Under the precedent of the First, Seventh, Eighth, Ninth and Tenth Circuits in the cases cited above, and discussed at length in the petition, a school district will not be held to have denied FAPE when the procedural violations in the IEP process are due, at least in part, to actions by the parents. See Petition, pp. 13-19. However, the Sixth Circuit's decision places all of the responsibility on the school district to ensure that the "cooperative" IEP process is followed, regardless of - and, in fact, in spite of - the actions or attitudes of the parents. Review by this Court is needed to provide guidance to the lower courts on whether parents' actions are relevant in determining whether a school district has provided FAPE under the first prong of the two-pronged Carter test.

The Sixth Circuit's decision raises the bar significantly for public schools in its jurisdiction to meet the first prong of the Carter analysis. This Court needs to review this case to provide guidance to the lower courts on where that bar should be set for determining when a public school has offered FAPE and how the nature and timing of parental actions should affect the setting of that bar.

B. This Court Needs To Provide Guidance To Lower Courts About The Appropriateness Of Parental Placements In Tuition Reimbursement Cases.

The second prong of the Carter test requires that the parents' private placement is appropriate under the Act. Carter, 510 U.S. at 15. The important question presented for

this Court is what makes the parents' private placement appropriate. The amendments to the IDEA do not provide any guidance on this issue. Indeed the IDEA regulations simply restate the Carter standard with the following language, "the private placement is appropriate." 34 C.F.R. § 300.403(c) (1999).

Interestingly, Respondents agree with Petitioners that their private placement should have been judged by whether it was necessary. "The real dispute was over whether a residential placement was necessary to allow Justin to benefit from his education." Brief in Opposition, p. 22. Respondents claim ample evidence to support the necessity of their private placement by citing to testimony of Dr. Kathleen Quinn. However, the Sixth Circuit never addressed Dr. Quinn's testimony or the issue of necessity. The district court, on the other hand, did. It held that Dr. Quinn's testimony was not supported by the record[2] and that a residential setting was not necessary for Justin. (App. 60a) It held that Bexley could have provided FAPE to Justin and that Bexley was not responsible to pay for Grove School. (Id.) The Sixth Circuit never addressed Bexley's proposed placement of Harding School Plus outside the context of the draft IEP. Knable, 238 F.3d at 768 (App. 22a).

Although the Sixth Circuit never specifically addressed the necessity of Grove School, it specifically rejected the proposition that the parents had to place their son in the least restrictive placement. Knable, 238 F.3d at 770 (App. 28a). In so doing, the court eroded a cornerstone provision of the IDEA.

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[2]The IHO provided a detailed analysis about why Dr. Quinn's testimony was not supported by the record. (JA 547-48)

As this Court noted in Board of Educ. v. Rowley, 458 U.S. 176, 194 (1982), Congress relied on right to education cases when drafting the Education for All Handicapped Children Act in 1975, now a part of the IDEA. One case specifically referred to in Rowley was Pennsylvania Ass'n for Retarded Children ("P.A.R.C.") v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972). In that case, the district court observed that disabled students have been historically segregated in overly restrictive placements. Id. at 293-95. The district court went on to adopt a consent agreement that provided for children to be placed in the least restrictive placement. Id. at 307. In 1975, Congressman Biaggi spoke on behalf of passage of the bill and stated, "The bill calls for educating these youngsters in the classroom whenever possible, since this is the most ideal approach." 121 CONG. REC. 23,709 (1975). Similarly, Congressman Brademas explained how the 94th Congress changed the proposed legislation:

> [B]y adding important new provisions to the act which would require the States to establish a goal of providing full educational opportunities to all handicapped children; to provide procedures for insuring that handicapped children and their parents are guaranteed procedural safeguards in identification and placement of the handicapped child; and that where possible, the handicapped child be integrated into a normal classroom environment.

Id. at 23,703

The law reflected this preference for the least restrictive environment (LRE) at 20 U.S.C. § 1412(5)(B)

(1991). See also 34 C.F.R. § 300.550(b) (1993). The law also addressed the concerns raised in P.A.R.C. of children being placed in overly restrictive placements far from home at 34 C.F.R. § 300.552(a)(3) (1993), which provides that a child's educational placement should be as close as possible to the child's home.[3] The amendments to the IDEA do not substantively change these provisions. Compare 20 U.S.C. § 1412(5)(B) (1991) with 20 U.S.C. § 1412(a)(5)(A) (1997), 34 C.F.R. § 300.550(b) (1993) with 34 C.F.R. § 300.550(b) (1999), 34 C.F.R. § 300.552(a)(3) (1993) with 34 C.F.R. § 300.552(b)(3) (1999). Courts have consistently held that IDEA's provisions regarding LRE evidence the strong congressional preference for mainstreaming. See Oberti ex rel. Oberti v. Board of Educ., 995 F.2d 1204, 1213-14 (3d Cir. 1993); Devries v. Fairfax County Sch. Dist., 882 F.2d 876, 878 (4th Cir. 1989); Daniel R.R.v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989); A.W. ex rel. N.W.v.

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[3]The note to 34 C.F.R. § 300.552 (1993) incorporates the analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. part 104-Appendix, Paragraph 24), which includes several points regarding educational placements of children with disabilities that are pertinent to the discussion of least restrictive environment:

> 2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home, and this issue may be raised by the parent under the due process provisions of this subpart.

Northwest R-1 Sch. Dist., 813 F.2d 158, 162 (8th Cir. 1987), cert. denied, 484 U.S. 847 (1987).

The Sixth Circuit's decision in Knable that parental placements can be appropriate without meeting the LRE standard does damage to the IDEA and the congressional intent that students be placed in the least restrictive environment. Contrary to Respondents' contentions, other courts of appeals have not ignored LRE like the Sixth Circuit. In M.S.v. Board of Educ. of City of Yonkers, 231 F.3d 96, 105 (2d Cir. 2000), cert. denied, __ U.S. __, 121 S.Ct. 1403 (March 26, 2001), the court held, "IDEA's requirement that an appropriate education be in the mainstream to the extent possible, see 20 U.S.C. § 1412(5)(B) (1991), remains a consideration that bears upon a parent's choice of an alternative placement."

The District of Columbia Circuit likewise has judged a parents' unilateral placement against the LRE requirement. Kerkham v. Superintendent, D.C. Public Sch., 931 F.2d 84 (D.C. Cir. 1991). The court concluded that the parents' unilateral placement at a residential facility far from home was more restrictive than the local extended-day program offered by the school district. Id. at 87-88. The court further held that the nonresidential placement could confer some educational benefit on the child, that is, the residential program was not educationally necessary. Id. at 87-88. Contrary to the Sixth Circuit in Knable, the court also held that the benefit that the child received at the residential placement had no bearing on whether the school district must reimburse the parents for its cost. Id. at 88. See also Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895, 906 (7th Cir. 1996) (affirming decision that a unilateral residential placement was not appropriate because it was not the LRE for the student).

If the Sixth Circuit's decision is allowed to remain, parents in that jurisdiction may place their children in overly restrictive placements far from home and those placements will still meet the second prong of Carter and be considered appropriate under the Act. This Court's decision in Carter did not call for such a result that would abrogate the IDEA's least restrictive environment requirement. In Carter, this Court brought common sense to the review of parents' placement, that is, the parents' placement could not be thrown out on technicalities (e.g., being under public supervision and direction) when those technicalities could not be met because the parents had to operate outside the public system when placing their child in a private school. Carter, 510 U.S. 13-14. This Court did not want to impose requirements that "would effectively eliminate the right of unilateral withdrawal." Id. at 13.

The least restrictive environment requirement is not a mere technicality and would not eliminate options for parents. The least restrictive environment requirement is a critical component of the IDEA designed, in part, to keep children from being placed in overly restrictive placements far from home. Parental placements, such as the Knables' placement of Justin at a residential facility 500 miles from home, should not be considered appropriate under the Act when less restrictive alternatives, such as Harding School Plus, are available. As has already been argued, such a result inappropriately lowers the bar for parents in tuition reimbursement cases and can allow parents to be reimbursed for placements made for personal, not educational, reasons. See Petition, pp. 27-28. Moreover, such a result erodes a cornerstone of the IDEA, the least restrictive environment requirement. This Court must take this case to provide guidance on what makes a parental placement appropriate under the Act, specifically with respect to the least restrictive environment requirement.

III. CONCLUSION

Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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